Three Secrets All Great Trial Lawyers Know[1]

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"Shane Read has written an excellent book that will be most helpful to the bench and bar for many years to come. I wish he had produced this gem 50 years ago so I could have used it when I was a trial lawyer. It would have also made easier my job as a trial judge if the attorneys had the benefit of *Winning at Trial* when preparing their cases. Shane draws upon his unique experiences as a civil trial lawyer, prosecutor and law professor to set forth in an original and practical way the skills needed to win in the courtroom."

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TURNING POINTS AT TRIAL

Great Lawyers Share Secrets, Strategies and Skills

SHANE READ

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For Benjie

A beautiful brother and trial lawyer

(1958–2015)

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INTRODUCTION

In my previous three textbooks, I have taken the lead to explain litigation skills. Here, like a good commentator at a championship game, I have let the great trial lawyers I interviewed take center stage.

As I wrote this book, I had one goal: I wanted this book to give readers access to specific trial strategies they could use that could not be found anywhere else. To that end, I did not want my subjects just to tell a bunch of war stories that were exciting but of no help to lawyers with more ordinary cases.

As a result, I required each of my interviewees to provide me with a transcript of a particular trial skill where there was a turning point that affected the trial's outcome. While all the transcripts were captivating, I analyzed them to confirm that they would reveal skills and strategies with wide applicability for all trial lawyers.

I then asked the lawyers to discuss, first, their trial strategies in general and then the specific skill from the transcript that resulted in the turning point for their trial. As the book evolved, I decided to include a section on depositions and appeals because many cases are won before or after a trial.

Learning trial skills from great lawyers in the context of these fascinating cases makes them easier to learn and more memorable. For example, the cases analyzed include the largest jury verdict against the Catholic Church for sex abuse by a priest, a $9 billion verdict against a pharmaceutical company for marketing a dangerous drug, a civil rights case against a police officer for falsely arresting a woman for murder, and the heart-wrenching case of a couple who fought for the return of their adopted daughter from her biological father who had obtained custody two years after the adoption.

This book also provides numerous links to related video and audio sources at www.TurningPointsatTrial.com for further study. In addition, each chapter has a checklist that summarizes the lawyer's strategies that are discussed in the chapter. This checklist provides a quick reference that ensures that the reader can remember the lessons learned. There is a wealth of strategies and skills taught in the book. In the checklists alone, there are 447 tips.

As you read the book, you will notice that the great lawyers who are profiled share common principles about trial strategy and the execution of trial skills. Unfortunately, these ideas and techniques are seldom taught in law schools nor

practiced in most courtrooms. The good news is that no matter what type of trial practice you have, you can learn the right skills and strategies from reading this book and immediately become more successful.

Courtroom advocacy is also an art. You will see that each lawyer adapts the trial principles and skills to fit his or her personality. By learning from the wide variety of successful lawyers who are profiled in this book, you can benefit from determining which strategies will work best with your own personality and skills and make adjustments as necessary.

A question you may have before starting this journey is, "How were the lawyers chosen?" There is no definitive list of great trial lawyers. Also, fame can be very misleading. Some famous lawyers achieved their notoriety for a particular case whose outcome was not dependent on the lawyer at all, but because the overwhelming facts, mediocre opposing counsel, the law itself, or some other cause determined the outcome.

Other famous lawyers have achieved acclaim through aggressive self-promotion. On the other hand, there are many great trial lawyers who never receive national exposure because they never seek it. Indeed, "famous" and "great" are not synonymous when it comes to describing a lawyer.

Consequently, this book does not pretend to create the definitive list of the greatest trial lawyers. While some of the lawyers in this book are household names, they were not chosen for their fame. I chose all the lawyers because they are certainly among the best at their craft and were passionate about sharing secrets, strategies, and skills so others could be successful. I also wanted to share with you perspectives from all around the country. In that regard, I interviewed lawyers from New York, California, Washington, D.C., Chicago, Alabama, South Carolina, Missouri, and Texas. The interviews cover the entire spectrum of trial practice lawyers, from plaintiff's attorneys to defense attorneys, prosecutors to criminal defense attorneys, as well as appellate attorneys.

In my teaching and writings, I am a strong believer that "less is more." With that in mind, let's end the introduction and begin a fascinating journey to improve your trial skills by learning from the best lawyers in America.

PART ONE

Opening Statement

INTRODUCTION

An opening statement is a speech given by a lawyer at the start of the trial that explains to the jury what the evidence will prove. Too often, lawyers throw this presentation together at the last minute and hope that by the time closing arguments arrive, they will have a more-organized speech. The unprepared lawyer is comforted by the conventional wisdom that states that you should save your best ideas for closing arguments anyway. This "wisdom" is based on the belief that jurors will follow the court's instructions given at the trial's outset to keep an open mind until all the evidence is presented. If no one is jumping to conclusions, the lawyer believes he can wait until closing arguments to comfortably summarize for the jury what has occurred at trial.

In reality, nothing could be further from the truth. A widely cited study found that 80–90 percent of jurors come to a decision about the case during or immediately after opening statements.[1] Human nature confirms this fact. We make quick judgments about who is right or wrong in our everyday life. It is nearly impossible to turn this decision-making process off just because a judge tells us to do so.

Moreover, law schools teach that you need to pepper your opening statement with the phrase, "The evidence will show…" in order to comply with the assumed prohibition of making arguments in opening statements. The flawed logic is that by repeating the phrase, you will only present the facts and not venture into the prohibited waters of arguing what the facts will prove. Again, this advice is completely wrong.

You will see in the following chapters that the opening statement is an opportunity to powerfully argue your case to the jury. In Chapter One, Mark Lanier, who the *National Law Journal* described as one of the most influential lawyers of the first decade of this century, will explain and show why the conventional wisdom is wrong. In Chapter Two, Windle Turley will share the secrets and strategies that allowed him to obtain the largest jury verdict ever against the Catholic Church because of sex abuse by one of its priests. In Chapter Three, you will learn a formula to use in any of your upcoming trials from Bryan Stevenson, who also gave one of the best TED Talks ever recorded.

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[1] Donald E. Vinson, *Jury Psychology and Antitrust Trial Strategy*, 55 Antitrust L.J. at 591 (1986) (Study based on 14,000 actual or surrogate jurors).

CHAPTER ONE

Mark Lanier

Create a Spellbinding Opening Statement

Lanier gave a frighteningly powerful and skillful opening statement. Speaking… without notes and in gloriously plain English, and accompanying nearly every point with imaginative… overhead projections, Lanier, a part-time Baptist preacher, took on Merck and its former CEO Ray Gilmartin with merciless, spellbinding savagery.

—*Fortune,* July 2005

In 2015, *National Trial Lawyers* named Mark Lanier "Trial Lawyer of the Year." In 2010, the *National Law Journal* declared Lanier as "one of the decade's most influential lawyers." While he has had many trial successes, we are going to look at two of Lanier's national record-setting verdicts: one involving the drug Actos and the other involving the drug Vioxx—a verdict which *The New York Times* reported "cemented his place as one of the top civil trial lawyers in America."

Although a lot can be learned from examining Lanier's trial transcripts, he brings to the courtroom many intangibles that cannot be seen. Perhaps Lanier's most striking quality is his love of teaching. When you see him in trial, he enthusiastically presents evidence on direct examination and passionately cross-examines witnesses so that the jury stays extremely interested and understands what is happening. He is sincere and easy to follow. He always uses visual aids and chooses words that are descriptive and uncomplicated.

CHAPTER HIGHLIGHTS

- Create a memorable theme
- Use descriptive phrases and analogies
- Tell a story that covers the good, the bad, and the ugly

Although he has several lawyers and paralegals supporting him at trial, he examines all the witnesses himself.

He is also extremely likable and charismatic. He explains that when he was growing up, his parents were constantly moving all over the country. He learned to make new friends quickly and adapt to different cultures. In short, he learned how to fit in and be liked.

When I saw him in a recent trial, he was grilling an expert witness on cross-examination. The expert was battling back and would not give an inch. The expert sneezed; Lanier immediately interrupted his examination and said, "Bless you." I asked him how he could so quickly switch from an intense cross-examination to a kind gesture toward the witness. Lanier's answer reveals his courtroom demeanor and should be a model for others to follow:

> There is a difference between dealing with an issue and dealing with a person. If I've got an expert on the stand that I am cross-examining who I think is putting a bunch of hooey out there for the jury, well, I'm going to dissect the hooey, and I am going to try and force that witness to accept the fact that what he is saying is bogus.
>
> That doesn't change the fact that I care genuinely for each person. They've got to sneeze—well, "Bless you." It's not personal, it's business. Even if I think that they are selling their soul for money, that they are a testifying prostitute, a jukebox you just put your money in it and they'll sing any song you want them to sing, it's not going to cause me to wish them ill. I want them to be the best they can be. I want their life to be good. I hope that's part of being genuine.

Lanier has a very strong desire to win. He confesses that he is a "very poor loser." He tells his clients, "If we win, you're going to find me to be nice and convivial and excited and happy. If we lose, there is a chance I won't talk to you much for the next few weeks because I just get, really, really solemn and down over losing. I'm hypercompetitive."

Lanier's journey to becoming one of the most successful civil attorneys in the country was not without detours. He graduated from Lipscomp University with a B.A. in Biblical Languages. He wanted to become a preacher but realized that by becoming a lawyer he could pay for his love of preaching without the hassles of becoming a permanent preacher. He never had an overwhelming desire to become a lawyer and make a lot of money. Says Lanier, "The motivation in my life is teaching and preaching, and taking care of my family—and law is that third priority that funds me to do it. I just happen to be really efficient at being a lawyer in a way that my skill set…makes money."

Lanier recalls early in his career that a top lawyer in Texas called him into his office and gave him this advice: He told Lanier that while he was currently a B-plus lawyer, he had the skill set to be an A-plus lawyer. But he cautioned Lanier that he would never become an elite A-plus lawyer unless he fixed his problem. Lanier asked, "What's my problem?" The lawyer said, "You put your family above your job. My daughter is thirteen. I've never been to one of her birthday parties, because I'm taking depositions and I'm working. You go to your kids' birthday parties; you put your children and your wife above the practice of law. If you do that, you'll never be better than a B-plus lawyer. Do you understand?" Lanier replied, "Yes sir, I understand."

But Lanier was thinking, "Thank the Lord I can be a B-plus lawyer and put my family first. I'd be happy as a clam as a B-plus lawyer, putting my family first, putting my faith first and my ministry there, because I didn't get in this game to be an A-plus lawyer. I got into this as a way to fund my family and my faith."

Lanier's actions speak louder than his words. Even when he is in a multi-week trial out of town, he always flies home to teach his Sunday school class, which often numbers in excess of 800 people. He recently took his class on a two-year survey of the Old Testament while simultaneously winning the record-setting Actos verdict (discussion to follow) in a courtroom in Louisiana. To get a sense of the effort Lanier puts into his Sunday school class, you can find a link for a video at this book's website, www.TurningPointsatTrial.com.

He also built the Lanier Theological Library in Houston, Texas, which houses a collection of over 100,000 books, with topics ranging from Church History and Biblical Studies to Egyptology and Linguistics.

As for his family, Lanier is married with five children. His mother lives across the street, and his sister lives just a few blocks away. The families eat lunch together every Sunday after church.

> *To define success, you look back at the memories that you've got of your existence on this planet — the ones that give meaning and purpose to your life. That starts with [the questions], how have you taken care of your family, how have you taken care of your talents and your skill sets, how have you served? For me, it's not just service in the law, it's also just service in a more direct ministry of life.*
>
> — Mark Lanier

Lanier's story would not be complete without learning why he chose to become a plaintiff's lawyer. After graduating from law school at Texas Tech University, Lanier was a defense attorney at a large firm in Houston. He was in trial, defending a railroad company that was at fault against a badly injured

plaintiff. Lanier thought he had figured out a way to win the case, so he took it to trial—but lost.

As he was driving home, he thought about having to tell his family about the loss. More important, he thought about the plaintiff who would be able to tell his wife they could now afford to keep their house, provide clothes for their kids, and have a life for their family. Lanier had what he called, in reference to St. Paul's vision of Christ and subsequent conversion, a "Damascus Road experience." He asked himself, "What am I doing? I thought I was going to win this case by lawyer's skill, even though the facts dictated I shouldn't." Lanier imagined a different outcome, where he would have gone home to "crow" about the fact that his legal skills produced an unjust triumph.

He left the big firm and joined a small plaintiff's firm before starting his own firm in 1990. Since then, Lanier has received every accolade possible for a trial attorney. Given his recognition as being one of the very best, I asked him what difference does the quality of the attorney make in a case's outcome. Perhaps he was being overly modest in his answer, but he believes that facts generally determine the outcome. He explains this further by presenting three distinct scenarios.

In scenario one, one side has an average lawyer with all the winning facts, and the other side has a brilliant lawyer. As long as the average lawyer does a good job, the facts will determine the outcome no matter how brilliant the other lawyer is.

> *Lawyers generally don't make a difference in winning the case. Lawyers make a difference in losing the case.*
>
> —Mark Lanier

In scenario two, the good facts are evenly divided between both sides: There is an average lawyer on one side and a great lawyer on the other side. Also, assume that neither lawyer makes big mistakes. The facts will determine the verdict, but the lawyers will influence its size.

As Lanier says, "Maybe the damages could be more with a great lawyer on the plaintiff's side, or the damages can be less with a great lawyer on the defense side, but generally the facts will dictate the outcome."

In scenario three, there is a great lawyer on one side and an average lawyer on the other. However, one of the lawyers makes a big mistake. If the great lawyer is the one to mess up, the average lawyer might win regardless of the facts, and vice versa. "Now here's where the difference falls," says Lanier. "Great lawyers don't tend to mess up; average lawyers are more likely to mess up." Lanier concludes that a lawyer's skill can make a difference, but "it's not as big a difference as a lot of people think."

Lanier's charm is that, despite all of his success, he is not arrogant. Many people who have seen him at trial (including myself) would say that he makes a very big difference in the cases he tries, no matter what the facts are.

1.1 THE BIGGEST MISTAKE LAWYERS MAKE IN THEIR OPENING STATEMENTS

Without hesitation, Lanier says the biggest mistake he sees trial lawyers make is "stretching the truth, trying to make something that it's not. Jurors smell that, and you lose credibility. When you lose credibility, you lose the ability to persuade."

Lanier "loves it" when other attorneys stretch the truth in their opening statement or during the trial. He doesn't object to improper questions at trial. Instead, he gets a real-time transcript of the testimony from the court reporter. He lets the opposing lawyer stretch the truth with the witness, so that the witness walks farther out on a limb. Then, on cross-examination, he uses the transcript to contrast the unreasonable things the witness had just said with the truth as shown by the evidence or other testimony.

When I saw Lanier in trial, he would crucify witnesses on cross-examination with the words used by their lawyer in the opening statement. Any exaggeration the defense attorney made in opening would come back to haunt the attorney, as Lanier would ask the witness, "Your attorney said 'X' in the opening statement. Now the truth is 'Y,' isn't it?"

1.2 CREATE A THEME FOR YOUR CASE

Months before a trial begins, Lanier thinks about an engaging theme for his case. It is a task that preoccupies him. He is not searching for a factual theme but a "story theme, a TV show, a movie." He recounts how he thought of the show *Crime Scene Investigation*—known as *CSI*—and related it to the jury that was deciding his first Vioxx trial. Although the Vioxx trial will be discussed in detail later, all you need to know now is that Lanier told the jurors in his opening statement that it was as if they were on a detective show called *CSI: Angleton* (Angleton is where the trial took place).

After he had won the initial Vioxx trial, there were two subsequent Vioxx trials where Lanier was not the lawyer. Lanier relates that the defense lawyers stole his theme and told the jurors in those trials that they were to act like detectives in a *CSI* show to prove that the plaintiff did not have a case. The next Vioxx trial where Lanier was the attorney took place in New Jersey. The defense filed a motion in limine that sought to prevent Lanier from making any reference to *CSI* until closing argument. But in New Jersey,

the defense goes first in the closing argument instead of the plaintiff. Consequently, Lanier knew that the defense had made the motion so that it could use the *CSI* analogy in its closing as it had done in the previous trials and prevent Lanier from taking advantage of it.

Lanier was not that easily fooled. He prepared a different theme. He summarized for me the closing he gave in New Jersey:

> Ladies and gentlemen, we are here about Vioxx, and you've been sitting listening to this trial for the last eight weeks. It's a trial about a beating heart, and this, in fact, is something we all have in common. We would not be here if our heart was not beating. We have an expression about something being as serious as a heart attack, because when your heart stops beating, it's traumatic, and it's tragic, but here we are…and the bad guys on the other side have said that this is like the TV show *CSI*.
>
> I find that appalling and offensive that they would ever make that suggestion. No lawyer should suggest this is *CSI*. Do you know why? Because "CSI" stands for "crime scene investigation." Now the judge has told you about the burden of proof here. The judge has said it's the preponderance of the evidence, [but a criminal trial requires much greater proof]. It's beyond a reasonable doubt.
>
> This is not what the judge has told you in this case. You shouldn't be thinking of this as a crime scene investigation—like I've got to prove my case to a criminal burden of proof. That's deceptive, that's lawyer trickery, and that's not what it is. It's not even almost beyond a reasonable doubt. All I need is the greater weight of credible evidence.
>
> You can have 49 percent doubt and vote for my client. This is not *Crime Scene Investigation*. Shame on you [defense counsel] for even making that suggestion! Now, I'm not against the TV show. But here's the TV show for this case: It's called *Desperate Housewives*.
>
> But instead of *Desperate Housewives*, we'll call this *Desperate Executives*, and instead of starring these five lovely ladies in New Jersey, we'll star Regal Martin, David Anstas, Briggs Morrison, Elise Rayson, and Edward Scolnick.

When Lanier recited his closing for me, he showed me the PowerPoint slides he had presented to the jury. The first one was an advertisement for the TV program *Desperate Housewives*. His next slide was a modified version of the first slide with the heads of the Merck executives substituted for the TV stars. Then, he continued with his recitation about four episodes of *Desperate Executives*.

> Here is your first episode: "Shoot for the Moon." [Lanier explains that he then put relevant arguments into the first episode.] Now that's the end of the first episode. Before we go to the next episode, let's pause for a com-

> mercial break. This is a real Vioxx commercial. You listen — do they give a warning? You won't hear one.

Lanier then explained the second episode and so on. If you want to see an excerpt of Lanier's closing argument, go to this book's website, www.TurningPointsatTrial.com.[1]

In our talks, I challenged Lanier to make a simple case interesting, because most lawyers don't have the life and death cases he has. He advised that in any trial, you need to tell the jurors that the verdict is their chance to make a statement. It is your job to tell them what the statement is and make it personal for them. For example, in a fender-bender case, you might say:

> Ladies and gentlemen, we should not have to do this when someone is at fault in a car wreck. We're not supposed to have to go through all of this. We're not supposed to have to file a lawsuit. We're not supposed to have to hire lawyers. This ought to be dealt with forthwith, straight away by responsible people. But here we are, and this is your chance to say, "Don't do this. If you're responsible for someone's wreck, don't do this."

1.3 HOW TO CHANGE BAD FACTS INTO GOOD FACTS

In addition to spending time on finding an engaging theme, Lanier tries "really, really hard to understand all of the facts…I divide them up into three categories: facts that are good for me, facts that are neutral — not good or bad — and then facts that are bad for me. Then I take all of the bad facts, and I figure out how in my story I can move them over into a different column and make them good."

Lanier practices what he preaches. In the courtroom, he is the most knowledgeable person there, whether those others are opposing counsel, the judge, or a witness. He not only has mastered the facts but has thought through them so many times that he can simply explain them to the jury.

He explained to me how he changes bad facts into good facts. In the first Vioxx trial (discussed later), Bob Ernst was in excellent health when he died from taking Vioxx. But in another trial, Lanier represented John McDarby, who was "one pork chop away from a heart attack. He had every risk factor there was. He was very old, he was obese, he was diabetic, he had a family history, and he had high cholesterol." People asked him how he could win with all those negatives. He replied, "I'm just going to turn them into positives."

He then demonstrated to me what he had explained to the jury:

> Look, we all live on a table or on flat land, but there's a table's edge or cliff, and that's the heart attack [Lanier points to the edge of a table in front of

[1] If you want to see Lanier discuss his strategies in detail for *Ernst v. Merck* and his second Vioxx trial, go to www.TurningPointsatTrial.com.

> us]. It's the leading cause of death in America. Some of us live real close to the edge, and other people live far away. If you are a 17-year-old kid, you're far away from the edge, but as you get to be 75, you're closer. Male, closer, diabetic, closer, smoker, closer, and all of these things move you closer to the edge of the cliff. [As Lanier talks, he moves a Styrofoam cup from the center of the table, which represents the 17 year old, closer to the edge as he mentions the risk factors of "male, diabetic, and smoker" etc.]
>
> Now let me tell you about Vioxx. Vioxx is a shove toward the cliff. [Lanier pushes the cup that is now at the edge of the table and knocks it off.] If you're a 17-year-old guy—girl, it doesn't matter—you probably could take all the Vioxx you wanted. It's not going to bother you: You can take that stuff, you can take that shove, but you take someone who's right up against the edge of the cliff, and Vioxx is the last thing in the world that person needs to be taking. I'll prove that to you, and I'll prove that Mr. McDarby was right up at the edge of the cliff, and he had no business being on that drug.

Your story needs to be the full story. It needs to cover the good, the bad, and the ugly.
—Mark Lanier

Lanier's use of the table as a visual aid perfectly demonstrates how to turn bad facts into good facts. As hard as Merck argues that McDarby's heart attack was caused by his other risk factors, Merck could not overcome this powerful image that McDarby was the last person in the world who should have taken Vioxx, given how close to the edge he was.

1.4 DON'T OVERSELL YOUR CASE

Lanier cautions that he tries very hard in his opening statement not to oversell. The reason is that the other side follows him, "and if you oversell an opening, the other side is going to get up, and they are going to tear up what you've said. Everything you say, you've got to be able to prove. Your opening needs to be thorough—you need to cover what the other side is going to say as well." For example, Lanier points out that in the example above, you have got to explain the weaknesses in your case. "Heaven forbid I try to make the McDarby case and not mention all of his risk factors."

By discussing the bad facts in his opening, the jury is primed for when the defense counsel highlights the plaintiff's bad health, suggesting those risk factors caused his death and not Vioxx.

However, don't misunderstand Lanier's advice "not to oversell" as a license to be overly cautious in your opening statement. As we will see, he argues passionately and vigorously. He does not deliver a meek opening in any shape or form. He argues powerfully with descriptive words and PowerPoint slides, but he is always grounded in the facts.

1.5 DELIVERING AN OPENING STATEMENT

When Lanier gives his opening statement, he has a PowerPoint slide that accompanies every topic he discusses. Although Lanier has a trial team of lawyers and paralegals, he creates his own PowerPoint slides. This control helps him create the exact visual aid he has in mind and helps him with his delivery. He does not need to memorize which slide is coming next or what argument goes with the slide because he already knows, having put in the time on the front end to create them.

When he first begins working on his opening statement, he writes an outline on paper. This outline develops into a story accompanied by PowerPoint slides. When Lanier walks into the courtroom, he leaves the written outline behind. Lanier believes it is better to have no notes and forget something, than to get up there and be wedded to a notebook where you are flipping through pages. If you do the latter, you are going to "lose eye contact with the jury and lose that connection."

As far as what Lanier would say to young lawyers who claim that they need an outline to speak in front of a jury, he explains that if they think they need notes, "They need to wean themselves away from it. They need to get into Toastmasters or go back to high school, and do high school debate. They need to do something to learn how to speak publicly without that."

Lanier then mentions the great plaintiff's lawyer, Gerry Spence. Lanier points out that Spence would instruct that if you have no notes, it will cause you to have this ache in your gut that you can channel into energy that makes you genuine. Spence would tell young lawyers that they should tell the jury the following:

> I'm really nervous that I'm going to forget something, but I want to be able to talk from my heart to you. Instead of just reading what I wrote, let me tell you what I think. If I'm a little nervous, it's because I'm afraid that I'm going to leave something out, but this is more than me reading a speech to you — this is me speaking to you about how I feel.

Lanier elaborates on why he uses themes, PowerPoint slides, and stories to communicate with the jury: First, you want to put your message in terms that make the most sense to people. Through visual aids and the words you use, you want to create a message the jury will understand. He mentions a study that states if you use a word someone doesn't understand, your audience will miss the next seven words you say while their brains try to assimilate

Practice Tip

The PowerPoint presentation for your opening statement does not need to be listed on your exhibit list. It is a demonstrative exhibit. Attorneys usually exchange them by agreement on the night before or the morning of the trial.

what you have just said. "You want to talk in a language they understand. You want to talk in metaphors that they can relate to, in images and pictures that are already anchored in their brain, so you're just tying onto something that is already anchored there." When he needs to educate the jury about a complicated scientific term that will be used in the trial, he introduces the word, pauses, and then explains what the word means.

Let's turn to Lanier's opening statement in his record-setting Vioxx trial.

1.6 *ERNST V. MERCK*

In 1999, Merck began selling a new drug, Vioxx, which it claimed would benefit arthritis sufferers. Its main competitor was Pfizer's drug Celebrex. Before these two drugs, arthritis sufferers had no choice but to take aspirin or Aleve. One problem with aspirin was that if you were elderly and took too much of it, it could cause dangerous bleeding in the stomach. Merck declared that Vioxx was revolutionary because it could inhibit pain like aspirin but avoid the side effect of stomach bleeding.

Vioxx quickly became immensely popular and profitable. By 2004, its worldwide sales were well over $11 billion. But shortly after Merck introduced Vioxx to the world, a study was released that showed that patients who took Vioxx instead of Aleve had a greater risk of heart problems because it would cause blood clots. While some doctors and patients believed this was proof that Vioxx was dangerous, Merck interpreted the study as showing that the only reason Vioxx patients suffered an increase in cardiac problems was because Aleve was uniquely able to protect against dangerous blood clots, not that Vioxx caused them. This study became known as the VIGOR study.

However, Merck's assessment changed in 2004. At that time, Merck concluded a study that sought to see if Vioxx would help prevent colon polyps. The study found that after 18 months of taking Vioxx, patients had an increased risk of heart attacks. With this information, Merck withdrew Vioxx from the market. While Merck claimed that it was withdrawing the drug out of an abundance of caution, David Graham, an FDA scientist, testified before the Senate Finance Committee that the FDA's failure to keep Vioxx off the market in the first place was "the single greatest drug catastrophe in the history of the world." An FDA study found that Vioxx may have caused an estimated 28,000 deaths between 1999 and 2003.

Mark Lanier was the first lawyer to take Merck to trial on a Vioxx claim, and his record verdict was heard around the country. The turning point in the trial was Lanier's opening statement. At the conclusion of the trial, the $253.5 million verdict was one of the largest ever awarded to a single plaintiff in any type

of case. That verdict has since been surpassed by another of Lanier's verdicts in 2014, when his client received a $9 billion verdict for dangers related to the drug Actos.

Years after Lanier's historic Vioxx win, Merck agreed to pay a $950 million settlement to the U.S. government for illegally promoting the drug and deceiving the FDA about its safety. It also pled guilty to a criminal misdemeanor charge of introducing a misbranded Vioxx into interstate commerce.

While it is true that Lanier's historic Vioxx verdict was reversed on appeal—and his $9 billion Actos verdict may be reduced on appeal—those facts do not take away from the truth that Lanier's persuasive skills in a courtroom achieve unprecedented results from juries and, ultimately, enormous settlements from defendants. Moreover, the massive verdicts that Lanier obtains have a significant impact on corporate defendants. The negative press and decline in stock prices from such trial outcomes are wake-up calls to pharmaceutical companies and give Lanier leverage to settle the claims for his other clients. For example, years after the first Vioxx trial, Lanier settled 85 percent of all Vioxx lawsuits for $4.85 billion. When Lanier obtained a $9 billion Actos verdict against Takeda Pharmaceutical and Eli Lily, Takeda's stock fell 9 percent in one day after the verdict was announced.

Before examining the opening arguments in the Vioxx trial, let's take a closer look at the case. The plaintiff was Carol Ernst, the widow of Bob Ernst. Bob began taking Vioxx a year before he died in 2001 in his sleep. He was 59 years old. He was a marathon runner. He took Vioxx to treat tendonitis in his hand. The trial began in state court in Angleton, a small town in Texas (population 18,977), on July 14, 2005. Five weeks later, the jury returned a verdict of $24 million in compensatory damages and $229 million in punitive damages.

The trial had many significant challenges. Not only was it the first attempt to hold Merck accountable for Vioxx, the medical examiner in the case, Dr. Maria Araneta, had concluded in her autopsy report that Bob had died from an irregular heartbeat (arrhythmia), not a heart attack caused by blood clots. No study had ever found that Vioxx caused arrhythmia, but studies had shown Vioxx increased the risk of blood clots.

Lanier was not discouraged. He hired a private investigator to find Dr. Araneta, who had moved to Abu Dhabi. He convinced her to come to Texas and give a videotaped deposition, where she concluded that, upon closer examination, Bob had died of a heart attack in contrast to her autopsy finding. She explained in her deposition that her autopsy report did mention an emergency room note that Bob might have had a heart attack. She said, "Something blocked that artery that was already narrowed—either a clot, a fissure, block… but…these things could be dissolved. He was resuscitated very vigorously. [The

clot] could have been dislodged, you know. And they fractured his ribs. They were pounding on his chest."

Lanier's charisma was immediately evident to the jurors and everyone in the courtroom. *Fortune's* description of Lanier's opening statement was used to begin this chapter but is repeated here for ease of reference:

> [Lanier] gave a frighteningly powerful and skillful opening statement. Speaking without notes and in gloriously plain English, and accompanying nearly every point with imaginative overhead projections, Lanier, a part-time Baptist preacher, took on Merck and its former CEO Ray Gilmartin with merciless, spellbinding savagery.

After Lanier's opening statement, Merck would never recover. *Fortune's* description sets forth the ideal opening statement that every lawyer should aspire to give. Lanier's presentation had the combination of a memorable story and creative visual aids. For example, when Lanier argued that Merck did not stop marketing the drug because "nothing could stop the Merck marketing machine" from making needed money for the company, he showed the jury a slide of a steamroller. When he discussed how Merck "duped the FDA," he showed a slide displaying a pair of hands hovering over three walnut shells. His mastery of storytelling continued as he showed pictures of Bob running in a race, competing in a tandem bicycle race with his wife, and posing with his wife on his wedding day. Lanier paused and said, "Then things changed," and Bob's photo was replaced by a silhouette. "Bob Ernst died." The argument was captivating and easily understood.

Contrast that ideal opening with the failing critique given to the defense counsel by *Fortune*.

> In Merck's opening statement, [the defense counsel] presented a thorough, meticulous, and seemingly plausible rebuttal of Lanier's contentions. But in contrast to Lanier, defense counsel spoke matter-of-factly of "NSAIDS" and "coxibs" and "cardiothromboembolic" events with only perfunctory stabs at translation. He seemed to read much of his presentation and illustrated it only with stodgy, corporate head shots of Merck officials or hard-to-read excerpts from documents with meanings shrouded in medical jargon.

Fortune said the winner was undisputed. "Lanier is inviting the jurors to join him on a bracing mission to catch a wrongdoer and bring him to justice. 'You've got to be the detectives here,' he told them. 'If this were TV, this would be *CSI: Angleton*.' Merck, in contrast, is asking the jurors to do something difficult and unpleasant like — well — taking medicine."

The defense team continued to make mistakes during the trial. For example, Lanier's direct questioning of Carol Ernst concluded before the lunch break.

Lanier predicted to a reporter for *Fortune* during the break that Merck's lawyer would conduct a disastrous cross-examination of Carol.

For 90 minutes, Merck's lawyer conducted a long-winded and disrespectful cross of Carol. At one point, she was asked about Bob's strained relationship with his adult children from a previous marriage.

Lanier said at the time, "The only reason for questions is a lawyer ego." The jury agreed. In post-trial interviews, jurors stated that they found Carol's cross-examination "insulting" and "disrespectful."

With this background, let's focus on the turning point in the trial.

> *The trial offers a stark choice between accepting Lanier's invitation to believe simple, alluring, and emotionally cathartic stories versus Merck's appeals to colorless, heavy-going, soporific reason.*
> —*Fortune,* commenting on *Ernst v. Merck* opening statements

1.7 LANIER'S OPENING STATEMENT

As we look at Lanier's opening statement, I have highlighted in bold several phrases that will be discussed. Lanier began by thanking the jury for their time and introduced his client, Carol Ernst, and her daughter to the jury. He then talked about how he would present evidence.

> There are a lot of Merck witnesses I want you to hear from. I'm not allowed to make them show up. So they won't be here because I can't bring them here. Merck has to voluntarily bring them in.
>
> There's one fella I'm allowed to force to show up because he lives within a hundred miles of the courthouse. But everybody else, if Merck will bring them, I'll put them on live so I don't have to show you movies. But if Merck won't bring them, we'll have to do them through the movies.

Lanier immediately puts Merck on the defensive. He suggests that Merck has something to hide by not bringing witnesses to testify live at trial. He further puts the fault on Merck if he has to show the jury "movies" of the depositions because Merck won't bring the witnesses to trial. These video depositions are, by their nature, not nearly so interesting as live testimony. As a result, Lanier lays the groundwork for the jury to believe that if there is a video deposition shown at trial, it is because Merck was scared to bring the witness to trial. The jury's boredom while watching the videos can also be blamed on Merck.

Lanier then spoke for a moment about how the evidence would be presented in the case and continued as follows:

> I appreciated [defense counsel] referencing yesterday [during voir dire] that I was supposed to turn this into entertainment. I don't know about that, but if I do put you to sleep, you're allowed to throw your steno pads at

> me — because you've given up five weeks of your life, and I'm not going to put you to sleep. I want you awake, and I want you tuned into the evidence.

Throughout his opening, Lanier builds a bond with the jurors. Imagine if you were a juror. What a relief it would be to hear from a lawyer that the trial will be interesting! In order to make it interesting, Lanier shows several PowerPoint slides on a projection screen with photos of Bob and Carol living a happy life. As he talks to jurors in this next segment, the photo of Bob fades, leaving the outline of his body.

> They did get married after being together for a number of years. Interestingly enough, they were introduced over exercise. And you'll hear Carol talk about her other daughter, Kendra, being the matchmaker between Carol and Bob.
>
> They got married. They had a wonderful time together. But ultimately, ultimately, the picture starts to fade and things start to go different. And let me tell you why. [Photo of Bob on projector screen fades and is replaced by Bob's silhouette.]
>
> You see, Bob Ernst is dead today. **One of my witnesses that I want to bring in the case I cannot bring you. Bob Ernst cannot come in here today.**[2] He is no longer here. He didn't know he was going to need to be here. He didn't leave us anything in video. He didn't leave us anything in writing that would talk about the issues that we need to talk about.
>
> So what you'll have is, you'll have Carol and you'll have Bob. They had been married for 11 months. And Bob was only 59 years old when he died. Now, some who are younger, that may seem like real old — but I promise you, as you start getting up there, it gets younger the older you get.
>
> He was 59 years old when he died. And what you've got to do is, basically, be the detectives here. You've got to figure out why he died. That's your job: Figure out whether or not, of the reasons he died, Vioxx is one of those causes. And that's your job. This is — **if we were going to put it in to a TV show, this would be *CSI: Angleton* because this is your chance.**
>
> **And I think the way you do it is going to be real easy.**

Lanier is a master communicator. He explains that his best witness, Bob, is dead. So, Merck has deprived Lanier the ability to put on his best case. Lanier addresses a weakness in his case — Bob's age. He explains that while Bob may seem old at first glance, he really had a lot of life left to live. Then, he gives them an analogy to understand the case; they are going to be detectives like those in TV's most popular mystery series that takes place in different cities (i.e., *CSI: NY*). Lanier then explains the importance of their role as detectives.

> [Y]our job is to get us to justice. There isn't anybody else. The way our country is set up, there is no one else — no one else that can find out

[2] Throughout this book, words in the transcript have been put in bold to highlight the point being made in the discussion that follows.

> whether or not Merck is a cause but you. That's it. **That's the calling.** This is what's on your life right now. Nobody else has this power. A judge can't do it. This is not a bench trial. Judge can't do it. Politicians can't do it. Nobody else can do it. This is something you've got. This is where you can make a difference in the world, absolutely can….
>
> I'm going to show you the motive, and I'll prove it to you. And my burden is to prove it by 51 percent, but I got to tell you, I'll prove it to you. **There's not going to be that doubt in your mind.** You're going to see the motive. You're going to see it clear.

The key to telling a meaningful story is to relate why it matters. Lanier empowers the jury and explains that this is not just a trial, but a chance for the jurors to make a difference in the world. Second, Lanier does what so few lawyers do (but should). He takes on an additional burden of proof and promises that he will prove his case beyond any doubt. He is not going to hide behind the lessor proof of 51 percent. How comforting it must have been for the jurors to know that their decision will be easy because Lanier will bring overwhelming evidence of absolute proof. Lanier's approach is consistent with how we reach decisions anyway. Jurors decide who is right, not who is just barely right (51 percent). Judges can give the instruction that a plaintiff only needs to prove his case by 51 percent, but it can't overcome human nature.

> Let's start with motive. Merck had the motive. What was the motive? **The motive was money.** Don't get me wrong. I think it's fine for a corporation to exist to make money. That's how we have jobs. That's how we have products. I think that's a good thing. But what companies have to do is, they have to watch to make sure that money doesn't take a priority position over health and safety.
>
> Merck had new management that came into play in 1994, and this new management took the company and **they tried to turn Merck into an ATM machine**, a machine that's spitting out the money, a machine where they could punch the buttons and they could draw out all the cash they want and need….

Discusses weakness

Notice below how Lanier turns a weakness into a strength. He anticipates that the defense counsel will discuss all the good Merck has done. Lanier admits Merck was a great company in the past, but he will show that it is not anymore.

> See, the historical company Merck had been was a family-run company. It had been a good company. I'm going to tell you, the history of Merck before this is a good history. Founded by George Merck. They put out real nice books on it [indicating]. This was a company that was really working hard to find good drugs over the years.

> This is a company that stumbled upon a drug that cured an African blindness — river blindness — and the people who could be cured with the drug didn't have money to buy it. They didn't have insurance. And so Merck gives it to them [for free] to try and take care [of the people]…. They had been a good company run by scientists….

By discussing how good Merck used to be, Lanier actually reveals how bad the company has become. Read how he continues to truly turn a weakness into a strength:

> **In 1994, Merck broke with tradition** and they hired a new CEO…. **the family is not running the company anymore. That's over.** This is now this big international concern. And what the board did is they chose to be a new kind of company in 1994. They hired Ray Gilmartin.
>
> Now, you might be thinking, "All right. I wonder what kind of a guy Ray Gilmartin is. Was he a top-flight doctor? Was he … like Dr. Vagelos … one of the best doctors in the country?" No, he wasn't.
>
> Well, if the board didn't turn to a doctor, maybe they turned to a chemist because they're doing chemistry, right? Maybe they turned to a chemist and got one of the best chemists in the world to help this company develop good chemicals. No, they didn't hire a chemist either.
>
> Maybe they hired a pharmacist. It's a pharmacy company. Maybe they hired a pill expert, a drug expert. Maybe that's who Ray Gilmartin is. No, Ray Gilmartin is not any of those things. And those were not the priorities Ray Gilmartin brought to the company when he came.
>
> What the company did is, they went and they hired Ray Gilmartin, and Ray Gilmartin is a Harvard-trained businessman, not a scientist. There's nothing wrong with a businessman running the company if he runs it right, but you're going to see what he did. If a Boy Scout has a compass or a Girl Scout has a compass and the needle is supposed to always point north, Ray Gilmartin took this company and made the needle always point to the dollar sign, and that's how they chose their direction.
>
> Ray Gilmartin made it not science first, like it had always been, not health first, not medicine first, not drugs first. **Ray Gilmartin made it profit first. He turned a good drug company into a business-first company.**
>
> And this is what I'm going to prove to you…. I'm going to give you chapter and verse on it.

If a Boy Scout has a compass or a Girl Scout has a compass and the needle is supposed to always point north, Ray Gilmartin took this company and made the needle always point to the dollar sign, and that's how they chose their direction.

— Mark Lanier, opening statement

The analogy of the Boy Scout and his compass and Girl Scout with her compass is perfect. Merck has lost its bearing, and that explains why it put a dangerous drug on the market.

Merck's motive

> And Gilmartin comes in. He restructures everything. He does something that I'm calling it, at the risk of a bad pun, murky ethics, because he takes the scientists and the science teams that are supposed to be putting science first, and he puts the salespeople on the science teams. He takes the briefcases and laptop people and a PR-type guy and a sales-type guy, and he integrates them into the people who are supposed to be developing the drugs. They got the salesman at the front end trying to figure out how to write the drug and test the drug in a way the salesman can best sell the drug….
>
> You say, "Oh, Lanier, how do you know?" You're going to see the evidence of it, because the FDA…finds a pattern and practice within Merck of misrepresenting the truth about the safety of their drugs. I've got to show you a letter we found.
>
> Here is a letter we found…Is that big enough for you all to see? Can you all see that? [T]his is what the FDA says: "This letter is in reference to Merck & Company's submission of promotional materials.…[The FDA] regards the promotional material [regarding the drug Trusopt] to be false and/or misleading."
>
> False or misleading. Now, if I'm a drug company and I get a letter like this, my reaction is going to be, "OK. Who's responsible? Come into my office. We don't do that. We tell the truth. We tell nothing but the truth. Doesn't matter if you're a salesman. You don't go out there and give out false and misleading material. You do it again, you're going to be fired. Or the people under you who do it again, they're going to be gone. I'm not going to have people working for me who do this."
>
> And I would love to tell you that that was done and this is the only letter I've been able to find from the FDA writing them up for their falsehoods and their misrepresentations, but it's not the only letter….

Notice that when Lanier shows the jury the letter on the projector screen, he is concerned whether the jury can see it. Great trial lawyers see their case through the jury's eyes. Lanier is not just presenting information. He wants it to be understood. He wants to make sure the jurors can see this important exhibit. If they can't, he will correct the problem. He is their friend, someone they can count on to present information that they can understand.

> Oh, maybe they quit in July of '99…Oh, no. We can fast-forward to December of 1999. They're still getting letters from the FDA on Vioxx be-

> cause their Vioxx ads are false, misleading, and contain misrepresentations of Vioxx's safety profile, unsubstantiated comparative claims, where they say Vioxx is better than these other drugs….
>
> That's why I tell you, that's why the evidence is going to show you the FDA finds a corporate pattern. It was sales at all cost. It was not business as usual. See, the new management turned Merck into an ATM. The story doesn't end there….

Merck's financial problems

> Because while they turned Merck into an ATM, the new management has, they got desperate. Gilmartin gets desperate because his ATM is set to run out of money starting in the year 2000/2001.

Lanier goes on to tell the jury that the patents on several Merck drugs are expiring. That means that Merck can no longer have exclusive control over the drugs. So, Merck needs a new drug to fill this void. Lanier argues that Gilmartin and others believed Vioxx would save the company. But there was a problem: The FDA had already approved a similar drug, Celebrex. Merck knew it had to rush to get Vioxx approved so it could catch up to Celebrex's head start.

Merck cuts corners

> So Merck goes to the FDA. They say,…would you approve us on a faster basis? Treat this like an emergency cancer drug…. They get a six-month rush on the FDA [instead of the two-year process]. I got to tell you—just bluntly—Merck starts selling the drug Vioxx before they finished testing it….
>
> Can you imagine if we stopped our studies and decided safety early? I want to measure safety. I'm going to tell Judge Hardin, "Judge Hardin, we're going to do a test. We're going to go out and measure safety. How safe is it to fall from a 100-story building?" Let's get some people who will do it for us, but I tell you what we're going to do.
>
> Well, we don't want to hurt people. **We'll use watermelons. We're going to drop watermelons from a hundred-story building and see how they handle the fall. But let's measure the results—let's not wait until the end. Let's go down to the tenth floor, and let's just cut the study off a little early and measure the results there.**
>
> **Down come the watermelons. This one is OK. This one is OK. This one is OK. Man, these watermelons look great. There's no problem**

> **dropping them from the hundredth floor if you measure them at the tenth floor.**
>
> You need to be on the sidewalk. You need to finish the test before you start selling the drug. Bottom line: Merck doesn't because Merck is in a hurry. This is the motive. Merck's got to have the money.
>
> New subject. Point Number 2. As you follow the focus of the evidence, look at the means. Let's look at whether or not Vioxx is, in fact, the means.

Lanier is the master of analogies. He uses another one to explain a complicated testing method: Watermelons dropping from a 100-story building. It is an image everyone can visualize easily. Moreover, the idea of testing a watermelon before it hits the ground is ridiculous, which is exactly Lanier's point.

Lanier then succinctly and clearly explains the risks to the heart associated with taking Vioxx.

Merck hides the ball

> Merck can choose any people they want to bring down to this courthouse to be the face of the company, to try to personalize the company so you don't think about the monstrous buildings they have all over the world. You think about the individual who comes into the courtroom. And that's their choice, and they get to pick that, however they want to do it.
>
> But I'll tell you who I hope they'll bring down, because I would like to put him on the witness stand…. I would put him on the witness stand Monday if they'll bring him down here. This man's name is David Anstice. And David Anstice is the president of Merck America — in essence, the American Merck company….
>
> They carefully pick what they give to the FDA. And then, what they also do is they dump hundreds of thousands of pages on the FDA when the FDA has got [a very small amount of time] to read them. Where's the best place to hide a leaf? It's in the forest. Where's the best place to hide water? In the ocean.

> *Where's the best place to hide a leaf? It's in the forest. Where's the best place to hide water? In the ocean.*
>
> — Mark Lanier, opening statement

Lanier paints a picture of Merck being an impersonal company that deceived the FDA. He knows that Merck is not going to bring Anstice to trial. While Merck may have legitimate business reasons for not bringing its head of the American division to testify, Lanier puts Merck on the defensive for not doing it. Then, he uses a wonderful analogy of leaves and water to explain Merck's deception to the FDA.

Lanier never passes an opportunity to use a familiar phrase or create a new one to convey his message. Here are two more:

> The first thing Merck does, **faced with the facts, [is that] they literally rewrite the book….** And do you know what they do? They invent a story. They do what I like to say: **"They turned science into science fiction."**

Merck recruits and then threatens doctors

> Have you ever heard the expression about offering someone a carrot? I always think of the cartoon with the carrot out in front of the donkey, and the donkey is walking trying to get the carrot, and you try and move someone where you want them to go by putting a carrot out in front of them. That's what they do to the doctors. They offer them carrots. They offer them treats. They offer them things. They offer to — oh, all sorts of things.
>
> They'll go to doctors, and they'll say, "Doctor, we have this shiny nice brochure on Vioxx. It's got all of this wonderful information, and…we've worked really hard on it. And it's illegal for us to pay you to read this because we can't pay you to do that. Do you know what we could do? We could give you $500 and ask you to look at it and tell us if you think that that's a good color blue and do you think the print is big enough and do you think…you know, is it pretty? Does it communicate well? Understand, when we give you this $500, that's not for reading this. That's for giving us feedback." And they play these kinds of games.
>
> And they go to other doctors nationally…. They say, "Hey, if we give this doctor a $10,000 grant to study something, then this doctor will get on board and tell everybody Vioxx is safe."…
>
> Now, not all the doctors go along with it…. **I guess if the carrot doesn't work, they take a stick and start whacking the donkey to make it move….** And you're going to hear his testimony about a number of doctors that are saying, "Hey, we think Merck is the reason we lost our job."

Lanier frames almost all of his arguments with an analogy that is easy for the jurors to understand and visualize. Here, Lanier describes that Merck treats doctors as if they were donkeys who can be rewarded with carrots or punished with sticks.

Merck advertises Vioxx

> Do you know how much they spend to push their drug? Over $1 billion dollars. That's 1,000 million. A million dollars, that's a lot of money. You can line up a thousand people, a lot more than in here, and give every one of them a million dollars. That gets you to a billion…. They spend over a million dollars just at this party to launch it.

> And then they put together the largest sales force in the history of any drug…. They had Dorothy Hamill do the figure-skating thing, and now she skates so much better because of Vioxx…. And please understand, none of us can go buy that drug. There's not one human being, unless you're a medical doctor and write your own prescription, who can go out and buy it. Why they're advertising to us is an issue, because they're trying to get you and me to go to our doctors and ask for Vioxx instead of Celebrex….
>
> **$161 million being spent at this time period to sell Vioxx to us…. That's more in that same time period than Pepsi spent selling Pepsi.** That's more than Budweiser spent selling Budweiser. At least Budweiser and Pepsi are things people can go buy…. They're putting hundreds of millions in to seduce the doctors to prescribe it. They're sending doctors on all sorts of junkets…. Merck says it's a good company, but it's not a good company to me…[as they are] paying doctors by giving doctors take-home coupons to go to the nicest restaurants and get all this food to take home to their family.

Lanier never forgets his audience. He simplifies everything. He wants this complicated case to become straightforward. He doesn't just say how much money Merck spent; instead, he breaks it down to a figure that everyone can understand. And just to make sure, he compares that figure to the amount of money Pepsi spent on its product.

Merck v. Bob

> So where are we so far? We got to move through — Merck had the motive: money. Merck had the means: Vioxx. And nothing is going to stop it from being out there. But when you put that together, **the motive** and **the means**, that's where you find the **death of Bob Ernst**. Let me bring it home now to Bob Ernst.
>
> OK. Bob Ernst goes to his doctor. Do you know what he goes there for? Bob goes to Dr. Wallace because his hand hurts. He's got hand pain. He's been taking naproxen for his hand pain, but you have to take naproxen a couple of times a day. And Bob was excited because he had been told Vioxx is a once-a-day pill. He could just take it once a day. So Bob goes to his local doctor for hand pain…The doctor did a bunch of tests on him….
>
> **Is this a fella who's one pork chop away from a heart attack?** No, he's not. He's in great shape. Bob goes in there, and they check his cholesterol. His total cholesterol is 169. That's a thumbs-up. His high-density cholesterol, his HDL, is 43. That's a thumbs-up. His pulse is 58. That's a thumbs-up. His blood pressure is 108 over 64. **This guy is the picture of health.**

> *Is this a fella who's one pork chop away from a heart attack?*
>
> — Mark Lanier, opening statement

> All of his test results like that are in the safe range. He's in great shape. But his hand hurts. That's what started this whole thing. **That's why Carol doesn't have a husband now. He went to the doctor because his hand hurt.**
>
> Bob exercised regularly. He ran. He biked. He was a weight lifter. He swam. He competed in triathlons.

After analyzing Lanier's opening, you forget that it is a mere negligence case. Lanier frames his story in so much bigger terms. It is framed as a murder case. He uses the words "motive," "means," and "death" to describe a monstrous company that knew its greed would kill people and never cared.

Lanier uses another analogy to describe Bob's health. Was he just one pork chop away from a heart attack? No, he was not. Bob's only problem was that his hand hurt. Then, Lanier summarizes his case: "That's why Carol doesn't have a husband now. He went to the doctor because his hand hurt."

Merck pressures Bob's doctor

Lanier contrasts Bob's health with Merck's marketing to Bob's doctor, Dr. Wallace. Dr. Wallace works in Cleburne, a small town in Texas. He's on Merck's "hit list." Read how Lanier chillingly describes Merck's actions:

> They've got a bull's-eye on the back of Dr. Wallace. There it is. He's on [Merck's] hit list. They're monitoring every prescription he writes. Did you know they can do that? Merck has some way of finding out every prescription…that he writes. And they're doing it. Now, they've redacted some of this document, but you can see up at the top on their project "coffin nail." What a horrible thing to call it!
>
> Here is their hit list for Vioxx, and here are the names of the doctors, and here is how much they're writing. And they've got Dr. Wallace from Cleburne, Texas, right there. And they're going to show you that…12.70 percent of [Dr. Wallace's] prescriptions are Vioxx. And Merck makes it a goal for those salespeople to get Dr. Wallace over 50 percent, and they start making sales calls [to] Dr. Wallace….
>
> Merck is in Dr. Wallace's office constantly. Merck wines and dines Dr. Wallace, literally…they pay him to do things…So they go, "Dr. Wallace, here is the deal. We can't pay you to write a Vioxx prescription, but I'll tell you what we can do. We'll give you, say, $300 or so if you'll let our salesman come with you on your visit with the patient and stand there and watch you physically write the Vioxx prescription.
>
> "We're not paying you to prescribe Vioxx. We're paying you because it educates our salesmen to be able to see the way you write a prescription…. We're not doing anything wrong. We're paying you for the educational aspect of it."

> And I asked Dr. Wallace about this in his deposition, and I'm going to play it for you. I said, "Dr. Wallace, is there some magic about the way you write a prescription that that salesman is going to learn something from you that he hadn't learned from the thousand other doctors he's been paying money to stand and watch them write prescriptions?" He smiled and he said, "No, I don't do it any differently."
>
> That's what they do. They wine him. They dine him. They take him to dinners. They pay him to watch and learn. And then they give him samples and samples and samples. They give him enough to where he's able to give Bob Ernst a couple months of samples.

Causation

> So net result, when you bring all of this home to Bob Ernst, how does it play out? Bob Ernst goes to the doctor for hand pain. Merck has been in there working the doctor over. And as a result, Vioxx is a cause of Bob's death.
>
> Now, Merck thinks that they can win this or anything else they ever come across because how am I going to prove to you that Vioxx was the cause. But that's not going to be the law. I don't care what [defense counsel] says. You can write it down, you can go to the bank on it. The Judge's instructions to you are going to say, specifically, there can be more than one cause, because there is in most anything in life.

Lanier then tells the jury that the only reason Bob, who was perfectly healthy before taking Vioxx, died from heart problems is because Vioxx caused his heart problems.

Conclusion

Lanier wrapped up his opening statement with one of his strongest arguments:

> The last thing, Your Honor, before we break, I would like to talk about their alibis briefly. This is where they start pointing their finger everywhere…. They're going to say, "Well, we never really knew that Vioxx caused heart attacks."

Lanier then discusses the studies that Merck conducted. Some studies showed that if you took Vioxx for more than 18 months, your risk of heart problems increased. Lanier points out that Merck did everything it could to ignore the bad studies and embrace the good ones.

> It's going to make you sick. It's going to make you sick, the way they maneuver their numbers and change this and move that over there and redefine things…. You need to hear Ray Gilmartin, who stands up and

publicly tells the stock investors and the stockbrokers, "Oh, don't worry about all these rumors that our drug causes heart problems."

I took his deposition. I said, "How can you stand up there and say that? I don't care if they are investing in your company. How can you say that? I'm looking at the study. Out of a hundred people taking the sugar pill, you get one death. Out of the hundred people taking this dose of Vioxx, you got four deaths. Out of a hundred taking that dose, you got two. By either account, you got two to four times as many. How can you say there's no increase when there's one with the sugar pill and there's six with Vioxx?"

And he looks me in the eye and he says, "Well, that's not significant, the difference between one and six."

So, I did what you would do. I pulled out my wallet. I handed him a dollar. I said, "Would you give me six back? I'm glad to notice there's no difference here with you. I'll spend the rest of my time with you all day swapping money until you agree that there may be a difference here."

Because that's just wrong. It's wrong to stand up and say something that's not the truth. But they've done it, and they're going to do it here, and I'm going to prove it to you.

Lanier ends his opening with this crescendo.

They're going to blame the victims. "Oh, this must be because Bob, even though he exercised daily, even though he ate right, even though he wasn't overweight, even though he had his cholesterol checked, even though he was the picture of health in every area except his arthritic hands and low blood sugar, even though he's the picture of health, this must be his fault."

No, no. Here is what you have: The motive, the means, the death. You got alibis that are nothing more than finger-pointing, and it's wrong, because what it's left you with is, it's torn apart…. It's taken your soul mate, and you'll [looking at Bob's widow, Carol] get to explain that to the jury.

You'll hear from her. I have to ask her questions, and you're going to think, "Lanier, I thought you were a nice guy. Why are you making her say all that stuff?" I have to. We have to not only say it for you, but we have to put it on a cold record…. about the anguish and how hard this has been on her and what she lost….

But it's a sweet story. It's a touching story, and you'll love it. You'll love to hear about their first date and where it was. It's the same restaurant they went to the night Bob died. And it's a neat story.

And I know [looking at Bob's widow, Carol] you're thankful to God for every day you had with him.

But you'll get to hear about it. And the worst part is, is while there are some good people at Merck—and I'm sure they're going to bring good people in here—this didn't have to happen, because the real people, the

> management, the people I want in here, the people I challenge them to bring so I can put them on in evidence for you, are people who changed the lifelong slogan. Merck used to be, "Where patients come first." That's not where it ended up. Thank you, Your Honor.

Lanier comes full circle. He began his opening statement by showing the jury photos of Bob and Carol together. He described Bob's active lifestyle and his love for Carol. He also explained that he could not force Merck's top executives to attend the trial, but that he hoped they would come and answer his questions. He ended his opening the same way. He started and ended his opening with his best fact: a healthy man, who was loved by his wife, died of a heart attack after taking Vioxx. He then couples that fact with Merck's cowardice in not showing up for the trial.

Reflecting back on his opening statement, there are so many images and simple ideas that Lanier has created that bolster his argument. A full list is located in the Chapter Checklist at the end of this chapter. Here are just a few: 1) Bob and Carol were soul mates, 2) Bob was the picture of health, 3) the only problem Bob had before taking Vioxx was pain in his hand, 4) Merck is afraid to bring witnesses to trial, 5) Merck thinks that six deaths out of a hundred is the same as one death out of a hundred, but won't give Lanier six dollar bills for every one he gives them, 6) to study whether watermelons will explode on impact from a 100-story building, you need to let them fall to the ground instead of the 10th floor, and 7) Merck had the motive, means, and victim.

1.8 DEFENSE OPENING STATEMENT

There is no quicker way to lose a jury's attention than to read your opening statement. Your goal is to connect with them, and you do that by looking them in the eyes and saying something powerful at the very beginning to get their interest. We know from the *Fortune* account previously mentioned that Merck's attorney read much of his opening statement. But what *Fortune* did not mention was how badly he started.

Imagine if you were on the jury and had just heard Lanier give an opening statement that was spoken like a preacher with powerful PowerPoint slides. Would this be a good response?

> May it please the Court.
>
> Good afternoon, ladies and gentlemen. I'm pleased to speak with you this afternoon on behalf of Merck.
>
> As you might imagine, we wouldn't be here today if there weren't two sides to this story. If it were an open and shut case, as plaintiffs have suggested, this case would have been over long ago. As Judge Hardin men-

> tioned during jury selection, this will be a somewhat lengthy case — lots of evidence to be presented, documents, and witnesses, some live, and some who gave their sworn testimony before trial and videotape. You'll see both during this trial.
>
> We appreciate the important job that each of you have ahead of you. It's a tough job to sort through and weigh all of the evidence — to tell the difference between allegations and proof—and we appreciate you undertaking that responsibility here.
>
> We believe that at the end of this case, you will see that the scientists and leaders at Merck conducted themselves prudently and responsibly.

Who wants to hear that this will be a "lengthy case" with "lots of evidence." On top of that, defense counsel explains that the jurors have a "tough job." Instead of reading his opening statement, the defense counsel should have spoken passionately to the jurors and told them that he would make their job easy. He would make it easy, because he would prove that whatever smoke Lanier tried to create, there was no fire: Vioxx did not cause Bob Ernst's death. Instead of presenting lots of documents and witnesses, he would only need to show them the critical ones necessary to reach the obvious answer.

Finally, word choice is vital. The defense counsel was speaking to a jury that came from a very small town in Texas. Only someone who embodies the corporate world would use words like "the scientists and leaders at Merck conducted themselves prudently and responsibly." To connect with the jury, defense counsel needed to use words for jurors in Angleton, Texas, not some hearing before the FDA. Better words would have been, "the people at Merck knew what was right and did it."

How would you have started the opening if you represented Merck? As with any opening, you want to grab the jury's attention and start with your strongest point. Let's compare the defense counsel's opening statement with another lawyer who represented Merck in a similar case. That lawyer is Phillip Beck. Here is his approach:

> Thank you, your honor. Mr. Birchfield [plaintiff's counsel] talked for about 60 minutes. While he was talking, about 60 people across the United States died from exactly the same thing that caused Mr. Irvin's [plaintiff's] death, and not a single one of them was taking Vioxx.
>
> I'm going to talk for about 60 minutes, and while I'm talking, another 60 people across the United States will die of the same thing that caused Mr. Irvin's death, and not a single one of them is taking Vioxx. The reason is that the thing that caused Mr. Irvin's death is the leading cause of death in the United States of America. That was true before Vioxx ever came on the market, and that's true today after Vioxx is no longer being sold.

> Several hundred thousand people a year die from having arteries that are clogged up with plaque, then having a rupture in the plaque, and then having a blood clot form in the artery so that not enough blood gets to the heart. It's the leading cause of death in the United States.

Merck would get a hung jury in this trial and then win on the retrial. Notice how well Beck frames his argument. Unlike the defense counsel's view in Lanier's trial that it is going to be a long trial with a lot of evidence that presents a tough job for the jury, Beck says the case is simple: The plaintiff died from something that is very common in America; indeed, it is the leading cause of death, and it has nothing to do with Vioxx. Also, in contrast to the approach in Angleton that was defensive and apologetic, Beck came out swinging. Finally, instead of providing content that was bland, Beck provided the jury with a startling fact about the leading cause of death in the United States.

1.9 CHAPTER CHECKLIST

Lanier's philosophy about life and the practice of law

1. A great lawyer can influence the outcome of a case, but it is not so big a difference as people think. The key is that the average lawyer will make more mistakes than a great lawyer, and those mistakes can lose a case.
2. It is not worth being a great trial lawyer if you have to sacrifice your time with your family.
3. Success is when you reach the end of your life and looking back, you feel that you have taken care of your family, taken care of your talents, and have served.
4. "I have a limited number of days on this earth. I don't want to spend my efforts doing something I don't believe in."
5. When an expert is clearly lying on the stand, you should challenge the expert's conclusions but never make it personal.
6. The biggest mistake lawyers make is stretching the truth. Jurors smell that, and you lose credibility.

Lanier's strategies for a great opening statement

1. Long before the trial begins, think of a theme in the form of a story, TV show, or movie that applies to your case.
2. Look for ways to change bad facts into good facts.
3. Don't oversell your case.

4. To maintain credibility, your story needs to cover the good, the bad, and the ugly.
5. Even in a run-of-the-mill case, you need to make the case personal for the jury and explain to them why it is important.
6. Do not use notes. Instead, speak from the heart.
7. Use PowerPoint slides to communicate your story to the jury.
8. Use words the jurors will understand.

Tips learned from Lanier's opening statement

1. Speak in gloriously plain English.
2. Accompany every point with imaginative, easily understood visual aids.
3. Entertain the jury.
4. Tell the jury you will make their job easy.
5. Empower the jury.

   "If we were going to put it on a TV show, this would be *CSI: Angleton* because this is your chance."

   "The way our country is set up, there is no one else. No one else can find out whether or not Merck is a cause but you. That's it. That's the calling."
6. Take on a higher burden of proof. Even though Lanier only had to prove his case by 51 percent, he said, "I'll prove it to you. There's not going to be that doubt in your mind."
7. Discuss weaknesses to maintain credibility with jury and frame the argument before the other side does. "The history of Merck before this is a good company…. but the family is not running the company anymore."

Lanier's descriptive phrases and analogies

1. "If a Boy Scout has a compass and the needle is supposed to always point north, Ray Gilmartin took this company and made the needle always point to the dollar sign, and that's how they chose their direction."
2. "[The CEO] turned a good drug company into a business-first company."
3. "The new management turned Merck into an ATM."
4. "We're going to drop watermelons from a hundred-story building and see how they handle the fall. But let's measure the results—let's not wait until the end. Let's go down to the tenth floor, and let's just cut the study off a little early and measure the results there."
5. "Where's the best place to hide a leaf? It's in the forest. Where's the best place to hide water? In the ocean."

6. "Faced with facts, [Merck leaders] literally rewrote the book."
7. "[Merck] turned science into science fiction."
8. "I guess if the carrot doesn't work, they take a stick and start whacking the donkey to make it move."
9. "$161 million being spent at this time period to sell Vioxx to us…. That's more in that same time period than Pepsi spent selling Pepsi."
10. "Is this a fella [plaintiff] who's one pork chop away from a heart attack?"
11. "That's why Carol doesn't have a husband now. He went to the doctor because his hand hurt."
12. When Merck CEO said, no difference in studies that showed 6 out of 100 taking Vioxx died when compared to 1 out of a 100 who did not, Lanier said, "I'll spend the rest of my time with you [the Merck CEO] all day swapping money [one dollar for six dollars] until you agree that there may be a difference here."
13. Bob was the picture of health.
14. Carol lost her soul mate.
15. Merck is afraid to bring witnesses to trial.
16. Lanier described that Merck had the motive, means, and victim, which translated to greed, Vioxx, and Bob.

Lessons to learn from defendant's opening statement

1. Don't read the opening statement.
2. Don't use bland visual aids.
3. Don't show hard-to-read documents on projection screen.
4. Don't use complicated words.