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“The Wolf Was Framed!” Little Red was no victim

Your client’s story takes on different meaning to jurors depending on the point of view from which it is told – and who is listening.

DIANE F. WYZGA

The story of Little Red Riding Hood is a cautionary tale. The Brothers Grimm wrote it to warn children, especially little girls, about whom to avoid. Then, like now, the wolf was seen as an animal to be feared and destroyed. So, it’s no surprise that the Brothers Grimm chose this creature as the metaphor to make sure children understood what form danger took. (It’s not by accident that men who prey on women are called “wolves.”) Decades later, helicopters swoop down clattering

from the sky, a shotgun aimed to fire at the moving target loping across the snow. One dead wolf. Why? Maybe it’s because, over generations, we have told this tale pretty much the same way each time.

Lawyers, too, tell stories. Often we tell our clients’ stories pretty much the same way each time. We begin at the beginning and end at the end. We stack up the facts and hope that the lawyer with the most facts wins. We hope that the decision maker writes the ending we want to the story we’ve told because our stack of facts towers over our opponent’s stack.

But what if the wolf was framed? What if there is another way to tell the story? And what if that approach gives you, the skillful lawyer, an advantage over the old way?

Facts and structure

Law school taught us to depend on facts and structure and linear thinking. Remember learning to brief your cases using the *IRAC* formula? We were taught to structure each brief according to a precise order: *Issue, Rule, Analysis* and *Conclusion*. And many of us continued



From the Trial Consultant's Seat

Question of the Month

Why do "storytelling rules" keep changing related to trying cases in court?

Answered by Katherine James, MFA, ASTC



James

This month's question comes from an experienced trial lawyer who has seen it all: "Over the years it seems to me that 'storytelling rules' keep changing when it comes to trying cases in court. If storytelling is such an ancient art form, how come we have to keep up with all these changes over the past 25 years?"

Yes, it is true – our storytelling changes because times have changed. Gone are the days when all you had to do was stand up and say, "My client was hurt by the defendant," and know you were telling the right story to get a good verdict.

Diane F. Wyzga is a master at storytelling in the courtroom. And as you can see in this article, she is loathe to give you one single answer to the question of how to tell your story. A trial consultant who specializes in storytelling, Diane lives in Southern California but consults on cases all over the country. I first became aware of her work at The American Society of Trial Consultants and soon her theories were being embraced by the AAJ.

Diane has many practical ideas for how to try looking at your cases from several points of view. It is then up to you to gauge which is best. I would caution you against falling into the trap of always telling the story from your client's point of view. How often do you say, "My guy goes into the hospital to have his gall bladder taken out and –" or "My gal is stopped at Main Street in

the left-hand turning lane, with her turn signal on, when –"

Start disciplining yourself to first tell the story from the defendant's point of view. The first example becomes: "The XYZ Hospital does 20 routine gall bladder surgeries a week. They've been doing that week after week, month after month, year after year. And they come to realize that every time Dr. Smith performs one of these surgeries, something goes wrong. But –" And the second example becomes: "Joe is in his car, late to work. As he nears Main Street and begins to ease into the left-hand turning lane his cell phone rings. He grabs it to see who is calling him when –"

This will feel odd at first. But it is your first step in making yourself more comfortable with differing points of view in telling the story of any case.

Don't forget – this column relies on you, our readers, to ask questions. We will respond with articles aimed at answering those questions. If you have a question that can't wait, I will endeavor to make sure that it gets answered by me or by one of my colleagues at The American Society of Trial Consultants. Please feel free to phone me or to e-mail me: katherine@actofcommunication.com.

Katherine James is the founder of ACT of Communication and a board member of The American Society of Trial Consultants. A trial consultant for 32 years, she has taught over 30,000 attorneys in her workshops and helped take over 1,000 cases to trial as a part of the trial team. A specialist in live communication skills, she has written several articles for this publication, including Can This Witness Be Saved From the Magic List?, Costuming For The Courtroom and Trial Practice, Practice, Practice. Her company was also featured in Donna Bader's article, The Courtroom as Theater: Is the Courtroom Just Another Stage?

writing this way through the state bar exam and on into our practices.

Factual structure and linear thinking fall far short of embracing the emotionally complex problems presented by our clients. Clearly, facts are necessary to build the story. However, it is the personal, emotional and conflicting aspects of your client's particular case which create the compelling story from those facts. And, as your opponent has discovered,

different stories can be created from the same set of facts.

A story focuses attention

We believe what we understand. We understand what comes to us in a story that mimics our life experiences, our world views. When a story directs our attention and judgment to certain key ideas, choices or behaviors, it helps us understand the significance of the

choices made by the parties in the case.

The decision makers – jurors – attend to your client's particular story within the larger story of their universal experience. How do they do this? They organize and sort out complex legal information, especially conflicting information, into meaningful structures that make sense. Using their experience or world view, they filter out information that does not coincide with what they



have come to expect and believe of the world, leaving behind the information that does. Next, they create a parallel form of social judgment that anchors legal questions in everyday understanding. They end up by telling a story that explains the events of your client's case in familiar terms with key words and messages that define the events from their point-of-view.

Who tells the story and how it is told are critical issues for you to decide. The jurors will write the end of the story; be certain the story you tell to them closely resembles your client's experience and leads to the ending you want them to write.

Location

The screenwriter, Robert McKee, tells us in his book, *Story*, that each scene of a story depends on our imagination to locate us in the time and space of the story. And this is especially true of the legal story. You want the decision makers to be in your client's shoes. You want them to travel with you on a virtual journey of your client's experience.

To bring them along on this virtual journey, you must consciously choose where you are locating the decision maker in the action. And you do that by being able to see the action yourself. You go to the accident scene, you visit with the client in his home, you travel to the rehab center – whatever it takes to place yourself in the story. It's not enough to sit across the desk with a pen and yellow pad and ask fact-based questions. Some prompts I've successfully used to elicit the story from clients are: "Imagine this," "One day," "It seems long ago and far away but," "So there I was," and "I wonder – has this ever happened to you?"

Point-of-view

The meaning of the story can change radically depending on who is telling it: that someone is telling the story from his or her own point-of-view. This angle of vision – the point-of-view

from which the people, events and details of a story are viewed – is important to consider when reading a story. McKee calls this "the physical angle we take in order to describe the behavior of our characters, their interaction with one another and the environment."

For example, a drive-by shooting happens in a neighborhood. A young man is shot. Witnesses include three people walking on the sidewalk: an elderly man sitting on a porch across the street, a woman raking leaves in her front yard, and the friend of the man who was shot. Here we have six different points of view and, most likely, six different descriptions of the shooting.

Two types of point-of-view

If the purpose of narration is to tell a story about an event or series of events, whose voice tells the story? Of the various types of point-of-view available, the two most easily used to tell the legal story are first person and third person.

- **First person:** In the first-person point-of-view, the narrator is always a character within his own story. He refers to himself by name or as "I." He takes actions, makes choices, has opinions and biases, and gives and withholds information based on his own viewing of events.

The inherent problem with first person is to realize that what the narrator is recounting might not be the objective truth. First-person narrators may not always be trustworthy. We are almost obliged to question the truth of what's being said because often it is in the narrator's best interest. The decision maker is required to figure out as much as possible about the character of the narrator in order to decide what "really" happened; what is truth and what is not? And that is why first person is not usually the best choice for telling your client's story.

For example, "I was driving home after a night playing guitar at a local bar. I had a few beers but nothing to impair me. When I saw the cop's headlights in

my rearview mirror, I skidded as I pulled over to the side of the road. I got out when the cop asked me to. I took the test, and the next thing I knew I was being arrested for driving under the influence. If I made a few mistakes, it was because it was snowing, the road was icy, the shoulder of the road was sloped, and I was cold." What do you think about his story? Do you buy it?

- **Third person:** Third-person narration provides the greatest flexibility. For this reason it is the most commonly used narrative mode. In third-person narrative mode, the focal character or characters are referred to as "he," "she," "it" or "they." And a third-person narration can be told with an objective or subjective slant to the story.

- **Third-person subjective:** The third-person subjective is when the narrator conveys the thoughts, feelings, opinions, etc. of one or more characters. Third-person subjective is sometimes called the "over the shoulder" perspective; the narrator only describes events perceived and information known by a character. At its narrowest and most subjective scope, the story reads as though the viewpoint character were narrating it; it allows in-depth revelation of the protagonist's personality, but it uses third-person grammar. One can shift perspective from one viewpoint character to another depending on what you want to reveal about thoughts, choices, decisions, events, perceptions, and the like.

- **Third-person objective:** The third-person objective mode tells a story without describing any character's thoughts, opinions or feelings; instead, it gives an objective point-of-view. This point-of-view can be described as a "fly on the wall" or "camera lens" approach that records the observable actions, but does not relay what thoughts are going through the minds of the characters. This point-of-view is preferred when you want to deliberately take a neutral or unbiased view, like in many newspaper articles.



Choosing the point-of-view

How do you decide the point-of-view to choose for your story? You begin by telling the story from various angles: people involved, items, equipment, the scene itself, etc. As you repeat the story from different angles, you will discover the one – based on the evidence you have – which best describes how the parties behaved, how they interacted with one another, and what transpired as a result. Keep in mind: you must choose the point-of-view that best supports the outcome you want.

To become more aware of the process of choosing *who* tells the story and *how*, get in the habit of asking yourself as you read a piece of fiction: Who is telling the story? What is their point-of-view? Is it fixed or does it change? Does it stay close to the events as they unfold or does it zoom in and zoom out, like a camera lens? How does their point-of-view affect your responses to the characters? How is your response influenced by how much the narrator knows and how objective he or she is?

Oftentimes, a plaintiff will choose to tell his story from the point-of-view of the defendant's choices that led to the injury suffered by the plaintiff. Typically, the plaintiff is framed as being compelled or forced to react to defendant's decisions or actions. While this is one effective approach, consider other points of view. For example, in a medical malpractice case, the plaintiff may tell the story from the viewpoint of any of the health-care personnel involved, the equipment used, the policies and procedures of the institution, training techniques in effect, and the like.

The wolf was framed

Little Red was a punk. Everybody in the forest knew it. The smaller creatures

like the snakes, foxes and chipmunks could hide easily enough in burrows. And the birds could usually fly away if a rock didn't take them down first. But for the rest, there was little place to go outside the reach of her destructive red boots and the pistol she hid under the muffins in her little red basket.

But her Granny couldn't hide. Little Red had been shaking down the old woman for her Social Security check for some time. The old woman lived in fear of Little Red. And she dreaded each visit. She had no idea what valuable item Little Red would steal and put in her basket, or whether she would use the pistol.

The forest was large. Creatures talk. Word got out in the 'hood about what was going down at Granny's cottage. Wolf was the guardian in the forest. She protected all the creatures in the forest and settled many complaints that came up with all the various personalities.

When word reached her about how dangerous Little Red was to Granny, Wolf took it upon herself to watch Little Red's comings and goings to Granny's cottage. Wolf took seriously her job of making sure everyone was safe. And that meant Granny, too. As best she could, Wolf would lope ahead to warn the old woman that Little Red was on the way. Oftentimes, Wolf hid just out of sight of Granny's cottage – just in case.

Not everyone prowling the forest was as kindhearted as Wolf. The one who comes to mind is the Hunter. He had taken it upon himself to keep law and order. And he didn't hesitate when it came to shooting anything that strayed out of line, or to break up a dispute. He had a sharp eye and a hair-trigger temper. Put that together with a shotgun and it was only a matter of time that there would be trouble.

For the longest time, the Hunter had his eye on Wolf because her pelt was lush. He knew it would fetch a good price from the right buyer. And the Hunter knew where to sell what he took from the forest. His plan was that if he was a little richer, he would stand a good chance at buying Little Red's love. Nobody said he was smart.

As luck would have it, the Hunter was patrolling around Granny's cottage when the Wolf loped into view. She was running, tongue out and panting to tell Granny that Little Red was coming down the path and to take care. But she never had the chance. The Hunter was trigger happy. And a glimpse of Little Red coming into view made him even jumpier. As the Wolf reached the cottage, the Hunter took aim and fired. The Wolf dropped dead. And now there is no one who knows what the Wolf knew. As the story goes, the woods are safer. But what if Wolf was framed?

Remember: the truth of your case is what the *decision maker* believes to be the meaning of the story. There are many angles from which to tell your client's story. You can determine the meaning by deliberately choosing the point-of-view that drives the decision maker's understanding about liability and fault and action for the entire case story.

Diane F. Wyzga, RN, JD, has cemented a strong national presence as a professionally trained storyteller, helping attorneys win cases more often by developing their creativity, critical listening and persuasive communication skills. With over 20 years experience, Diane founded Lightning Rod Communications www.lightrod.net. She specializes in legal communications strategy, focus groups, and the preparing of the trial story from start to finish. She may be reached by e-mail at diane@lightrod.net.