

Identifying the Protagonist

By Brad Bradshaw

Most stories have a protagonist – a main character that is the focus of the story. In Hollywood the protagonist is usually the hero and the story is presented from his perspective as he takes on the evils of the world. However, for an opening statement the protagonist should not be the “good guy.” The jury’s job in a civil case is to assess the reasonableness of the parties. In doing so they tend to attribute responsibility to the person they hear the most about because, by hearing all the details about that person’s actions, it is easy to identify things that should have been done differently. Jurors have the benefit of hindsight and they tend to view critically the decisions made by the person who is the subject of the story. Therefore, an attorney should always keep the focus of the story on the actions of the other party.

The most effective way to tell a story is to pick one person and tell the entire story from that person’s perspective. The attorney, acting as a narrator, should tell the story as if she had followed the protagonist throughout the course of the events. In a medical malpractice case the plaintiff’s attorney should make the story almost entirely about the doctor. The story should begin several hours before the plaintiff arrived at the ER to highlight all of the relevant factors that contributed to the doctor’s actions (e.g., the doctor was exhausted because he was on the tail end of a 24-hour shift). In this version of the story the plaintiff should not be mentioned by name until the very end – perhaps when discussing damages. The story is about the doctor so jurors’ attention should be focused exclusively on what the doctor did, or failed to do.

In the same medical malpractice case the defense attorney should talk about the plaintiff’s actions, such as the signs and symptoms that were ignored for several hours. For example, “After experiencing symptoms for nearly five hours, Mr. Jones finally decides to go to the hospital. He walks into the lobby of the ER and, in less than four minutes, he is in an examination room talking to a doctor about his symptoms. However, the damage has already been done. Since Mr. Jones decided to ignore the early signs of his stroke, there is nothing the medical staff can do to help. Ladies and gentlemen, Dr. Smith did everything possible to help Mr. Jones but [insert the case theme here].” The most important thing to note in this example is that the doctor is never identified by name until the very end of the story. Until that point he is simply “a doctor,” or “the medical staff.” That way the focus remains solely on the actions of the plaintiff. If the defense attorney provides too much information about what the doctor was doing, the jury will have more information to assess with a critical eye.

Telling the story from the viewpoint of the opposition also enables the attorney to direct the blame at the other party both discretely and tactfully. This is particularly important for the defense. Overt attempts to blame the plaintiff for his own injuries during opening statements can cause a backlash because the attorney has not yet established credibility in the eyes of the jury. By telling a story that focuses entirely on the plaintiff’s behavior, the defense attorney does not need to speak too critically of the plaintiff’s actions because, when presented properly, the jurors will see it for themselves. Allowing jurors to come to their own conclusions also strengthens their feelings on the issue because they feel like they have solved the puzzle themselves.

As a side note, when selecting a protagonist (and other characters that will be identified in the story) the attorney should decide what names everyone will be called throughout the trial. Referring to the same person in several different ways (e.g., Joe, Joey, Joe Smith, Mr. Smith) confuses jurors. Using the same name throughout the trial reduces the amount of effort jurors need to make in order to understand the story. Further, jurors' perception of an individual can be shaped by the name used to describe that person. Examples include using an individual's nickname to help humanize that person and plaintiff attorneys minimizing a doctor's status by referring to him as "Defendant Jones" instead of "Doctor Jones."