

# **THE USE OF DEPOSITIONS AS A SWORD AND A SHIELD IN 21<sup>ST</sup>-CENTURY TRIAL PREPARATION**

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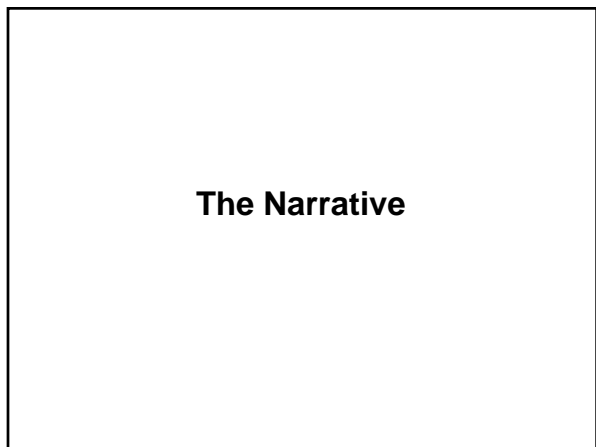
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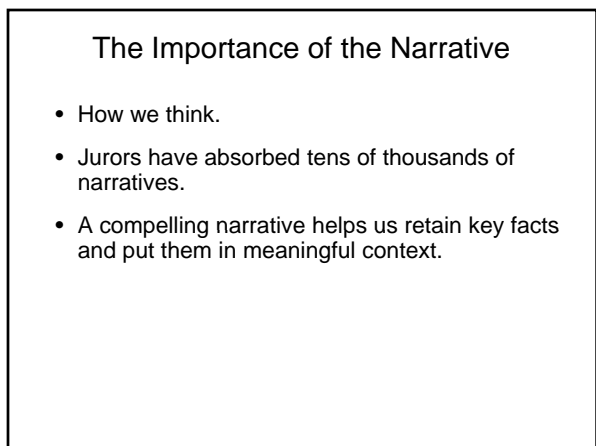
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The Importance of the Narrative (continued)

- Whether you like it or not, the jurors will assimilate the evidence into a narrative.
- **LSC:** The most logical, simple, compelling narrative wins.
  - We live in a post-modern / white noise culture – the “Tune Out” Effect.

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Framing the Narrative Early

***Carpe Diem!***

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Trial Date Creep:

**The Role of Party Opponent Video Depositions in Establishing the Narrative in 21<sup>st</sup> Century Civil Litigation**

- “Discovery” is a misnomer.
- “Tee it up for me to try” is a 19<sup>th</sup>-century litigation strategy.
- Video Deposition = Trial (Cross-Examination) Testimony
  - Use for “any purpose” at trial:
    - Integration of snippets into opening / closing.
    - Use in cross-exams: high-impact impeachment.
    - Use with other witnesses.
    - Use as stand-alone testimony.

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### Trial Date Creep:

#### The Role of Party Opponent Video Depositions in Establishing the Narrative in 21<sup>st</sup> Century Civil Litigation

*(continued)*

- Sophisticated trial management technologies allow for maximum flexibility.
- Juror attentiveness is enhanced by varying the approach to video testimony.
- Far cry from the days of reading in depositions (juror snooze).

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### The Elements of the Narrative

- Legal standard.
- Factual development / timeline (the "Plot").
- Case terminology.
  - Word choice really does have consequences.

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### Case Terminology – It's Up For Grabs!

- Sounds obvious – but often not pursued.
- Deponents (even parties) are often empty vessels willing to adopt opponent's nomenclature
  - Particularly early in the case.
- Take advantage of opposing counsel's lack of preparation.
- Jury research – early and often – to develop and hone themes / language.

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### Case Terminology – It's Up For Grabs!

(continued)

- Get experts on board early to help shape case terminology.
- Prepare a glossary of key terms to use / avoid.
- Deposition questioning: Incorporate precise shadings of meaning.
  - A leg up in establishing case terminology in deposition = A leg up at summary judgment and at trial.

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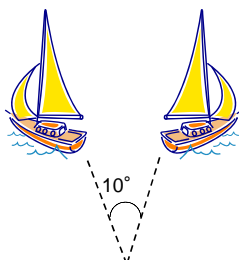
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### The Rule of 10 Degrees



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### Framing the Narrative: Plaintiff's Depositions of Key Defendant Personnel

- **DANGER:** One bad answer – on videotape – is locked in for all time.
  - Bad faith / punitive exposure.
  - Carryover to future cases.
- Budget time and money for adequate preparation.
  - Multiple prep sessions.
  - Video / mock cross prep.
    - Credibility, Credibility, Credibility!
    - Television is a cool medium.

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**Framing the Narrative: Plaintiff's  
Depositions of Key Defendant Personnel**

*(continued)*

- Adoption / incorporation of case themes and nomenclature.
- The problem with CEO depositions.

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**Framing the Narrative: Deposition of  
Plaintiffs**

- Videotape!
- Trial lawyers should take plaintiff depositions.
- Budget substantial preparation time / develop written outline of exact wording of key questions.

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**Framing the Narrative: Deposition of  
Plaintiffs**

*(continued)*

- Tell the defense story through the plaintiff.
- Ask the ultimate questions – lightning need strike only once.
- Good Cop vs. Bad Cop.
  - Most witnesses want to agree with the questions.

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### Seize The Terminology: "Profit" vs. "Compensation"

Trial Testimony of Plaintiff

**Q:** Now focusing on your time as a contractor, you told me in your deposition that your purpose was to make profit, correct?

**A:** Yes, sir I did.

**Q:** And you're not here today complaining about the level of profits you made, are you?

**A:** No, I'm not.

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### Seize The Terminology: "Fiduciary Duty"

Deposition Testimony of Plaintiff's Director

**Q:** You and your fellow board members had sole authority to make decisions on behalf of the joint venture, correct?

**A:** Yes.

**Q:** So we can agree that, as directors, you owed a duty to both entities in the joint venture, fair to say?

**A:** Right –

**Q:** A fiduciary duty, correct?

**A:** Sure.

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### Seize The Terminology: "No actual safety violation"

Deposition Testimony of Plaintiff in Whistleblower Litigation

**Q:** Was there ever an instance where an aircraft took off while out of compliance with the Federal Aviation Regulations?

**A:** Not that I'm aware of.

**Q:** So is it fair to say you were never aware of any actual safety violations by the airline?

**A:** That's fair to say.

**Q:** So you're not claiming that Mr. Smith or any of his superiors ever did anything to compromise safety, are you?

**A:** Oh, no.

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**The Enhanced Opportunities Presented  
by Class Actions / Multiple Plaintiff Cases**

- Exploit factual disparities / divisions within the class.
- Refute overreaching factual contentions.
- Ferret out stealth defense witnesses whose admissions are party opponent admissions.

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**The Enhanced Opportunities Presented  
by Class Actions / Multiple Plaintiff Cases**

(continued)

- Do not assume all class members are hostile.
  - Many are ambivalent.
- Do not assume all class members are well-prepared or knowledgeable about the issues.

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**Summary**

- Establish the case narrative early.
- Small gradations of language can make a huge difference over time.
- Prepare for party depositions as if for trial.
- Always videotape plaintiff depositions.

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**Practice / Experience**

Mr. Baumgardner is one of the founding partners of Corr Cronin. Mr. Baumgardner was formerly the Chair of Bogle & Gate's Product Liability/Personal Injury Practice Group, and was a member of that firm's Executive Committee. He has been named a "Super Lawyer" by *Washington Law & Politics* magazine numerous times, has been designated one of Seattle's "Top Lawyers" by *Seattle Magazine* and has been recognized as a Seattle "Litigation Star" by *Benchmark, America's Leading Litigation Firms and Attorneys*. Mr. Baumgardner is also included in the 2009 edition of *The Best Lawyers in America* and in the 2nd edition *Guide to the World's Leading Product Liability Lawyers*.

Mr. Baumgardner has tried cases in the state and federal courts of Washington and Alaska, and has appeared before an international sports law tribunal in Lausanne, Switzerland. He has also handled labor arbitrations, administrative trials, and civil case arbitrations. Mr. Baumgardner has represented dozens of Fortune 500 companies in complex litigation. Among the many individuals he has represented are a Nobel Prize winner and an Olympic medalist, both in matters concerning their professional standing. His broad-ranging litigation practice focuses on product liability, labor and employment, commercial, toxic tort and personal injury cases, as well as international sports law and the defense of alleged whistleblower litigation.

**Education / Background**

- J.D., Columbia University School of Law, 1984  
Harlan Fiske Stone Scholar
- B.A., with high honors, English, Michigan State University, 1981  
Elected to Phi Beta Kappa
- Joined Bogle & Gates P.L.L.C. in 1984, became a Member in 1992
- Founding partner of Corr Cronin Michelson Baumgardner & Preece in 1999
- Admitted to the Washington State Bar in 1984. Admitted to practice before the U.S. District Court for the Western District of Washington and the Ninth Circuit Court of Appeals.
- Current president of the United State Eventing Association, the national organization of the Olympic equestrian sport of Three-Day Eventing

**Professional Memberships**

- Washington State Bar Association Trial Practice Section
- Seattle-King County Bar Association
- American Bar Association Litigation Section
- Network of Trial Law Firms
- Federal Bar Association for the Western District of Washington

