DOES FRONTING BAD EVIDENCE "SPONSOR" IT?

Are we wrong to front bad facts? Is that "sponsorship," *i.e.*, giving the bad fact your imprimatur? The question may sound crazy – and if you read to the end you should see that the answer to each of those two queries is a resound "no." But sponsorship theory lives, and it reared its head in a recent case.

Fronting bad facts is something we all teach and, in practice, do – when we lose that pre-trial motion *in limine* and know a damning fact is coming, we front it. Death penalty lawyers do it in *voir dire*, asking potential jurors about how that horrific fact may make them think about the case and the option of a life sentence; we hear it in opening statements ["we'll be the first to tell you…"]; and on direct examination it comes in, usually somewhere in the middle where it has neither the primacy nor recency effect.

And that practice – taking the sting out of the opponent's proof – is what is encouraged in classic trial advocacy texts. Mauet, TRIALS: STRATEGIES, SKILLS AND THE NEW POWER OF PERSUASION, 2nd Ed. 198 (2008); ("[prior convictions] are obvious things the cross-examiner will explore, and are things you can and should defuse on direct"); O'Brien and Gildin, TRIAL ADVOCACY BASICS, 2nd Ed. 105 (2016)("If your witness is subject to being impeached…you should bring that matter out during cross-examination…If you do not but your opponent does, it will appear that the witness tried to hide the matter. Even worse, the jurors may think that [counsel] tried to keep the information from them."); Lubet and Lore, MODERN TRIAL ADVOCACY, 6TH Ed. 74 (2020)("it may be advisable to bring out potentially harmful…facts on direct…[I]t will be all the more damning if the witness is seen as having tried to hide the bad facts").

So how did "sponsorship" theory get raised? To give context, I need to take you back to 2000, and the United States Supreme Court decision in *Ohler v. United States*. Maria Ohler's lawyer brought out, on direct examination, her prior conviction *after* an *in limine* ruling deeming it admissible over defense objections. The Supreme Court's view? Maria Ohler lost her right to appeal the issue because "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."

Many states expressly declined to follow this 'rule,' and Pennsylvania appeared to do the same until December, 2022. Then the Commonwealth's Superior Court ruled that Raheem Stevenson, who lost a similar *in limine* ruling, waived the right to challenge that ruling by fronting the bad fact as follows:

> Q: Mr. Stevenson, before I turn the floor over to the district attorney, back in 2005 – I know that was some time ago -- but back in 2005 you had a prior matter where you pled guilty and sentenced on a burglary case; is that correct?
> A: Yes.
> Q: Okay.

However inartful in wording and placement (the finale of the direct examination), that cost Mr. Stevenson his right to appeal.

This author took on Stevenson's case *pro bono* and secured review in the Pennsylvania Supreme Court. After the filing of the Brief for Appellant, which had substantial legal arguments and the advocacy points made above, the prosecution responded in part by arguing that maybe fronting evidence was *bad* for the proponent. Here is what they wrote:

> *But see*, *e.g.*, Robert H. Klonoff & Paul L. Colby, *Winning Jury Trials: Trial Tac-tics and Sponsorship Strategies* 66–90 (Nat'l Inst. for Trial Advocacy) (3d Cir. 2007) (arguing that preemptive admission of adverse evidence is in most instances ill-advised because juries, presuming that counsel present their cases in the best light possible, will give particularly heavy weight to adverse evidence they themselves admit); *id*. at 66–68 (arguing that preemptive disclosure of the defendant's prior conviction is typically unwise because it will likely be treated as the defense's concession of its materiality in assessing the defendant's credibility); Bill Allison, *Witness Preparation from the Criminal Defense Perspective*, 30 Tex. Tech L. Rev. 1333, 1341 (1999) (similarly arguing that preemptively introducing the defendant's prior conviction, even if sensible in theory, is of questionable efficacy in practice).

Commonwealth v. Stevenson, Brief for Appellee, 20 fn. 11.

Could this be correct? It turned out that this stance was neither supported by science nor a complete accounting of what these two sources claim. Here is what the Reply Brief explained:

> The Commonwealth seeks to diminish the importance of preemptive disclosure by suggesting that it is a 'last resort' and might actually disadvantage a defendant. It does so by selective and incomplete excerpting of sources and relying on at least one that has been repudiated. Brief for Appellee 20, fn 11.
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> Both of the sources cited by the Commonwealth rely on "sponsorship" theory, the notion that the party that introduces a fact 'owns it' in the eyes of the jury. But that theory has been exposed as lacking scientific support. Stanchi, Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy, 60 Rutgers L. Rev. 381, 414 (2008) ("Preemptive disclosure of negative information has also been tested several times in the trial context. In virtually all the studies, preemptive disclosure of negative information was judged to be strategically advantageous."). As well, neither author relied on by the Commonwealth is absolutist in opposing preemptive disclosure.
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> The Allison article WITNESS PREPARATION FROM THE CRIMINAL DEFENSE PERSPECTIVE, 30 Tex. Tech L. Rev. 1333, 1339 (1999) makes no mention of the scientific research and urges that lawyers not 'front' the bad fact of a prior conviction when it "is not strictly relevant to the charges at hand, let's say a prior theft conviction in a DWI trial…", a far cry from the case at hand. Klonoff and Colby themselves acknowledge that sponsorship, *i.e.* fronting the bad fact, is proper when the evidence can be "devastating." WINNING JURY TRIAL: Trial Tactics and Sponsorship Strategy (2002), §4.04(7).

Commonwealth v. Stevenson, Reply Brief for Appellant, 9-10.

Stevenson's case was argued on March 6 of this year, and a decision on whether the *Ohler* rule will be applied in Pennsylvania will be forthcoming at some point in the next year. Whatever the law becomes, what we teach has good science behind it. If it really hurts, bring it out – and no one will see you as the sponsor.