COLLECTIVE WISDOM

DEALING WITH DEVASTATING PROOF

JULES EPSTEIN

NITA®

Dealing with Devastating Proof

Every lawyer has been confronted with, or obsessed over, that one damning item of proof—the confession, the prior act eerily similar to the case on trial, the motive that no one else shares, the lengthy criminal history, the client's drug or alcohol abuse—and how to deal with it.

Consider these varying responses and options:

- **In an in-home sexual assault trial in days of old (pre-DNA), there was a strong case for mistaken identification but for one shred of proof—outside the victim's home, in the shrubbery, was a gas station receipt with the suspect's name and signature. A legendary Philadelphia attorney focused solely on the evidence of innocence and touched (literally and figuratively) the receipt but once. It was dismissed as, "What is this, a piece of paper that could have come there from anywhere," or words to that effect. The jury acquitted.**
- **As reported in *The New York Times*, in a trial against pharmaceutical distributors for allegedly contributing to the opioid crisis, plaintiffs introduced emails where employees of the defendants referred to the local community as "pillbillies" living in "Oxycontinville." The defense response? The emails "were cherry-picked and just examples of employees expressing work fatigue."[1]**
- **The advice of a sage plaintiff's attorney that "if you have to eat [expletive deleted], don't nibble."**
- **The standard prosecution mode when working with a jailhouse cooperator or accomplice—front all of their past and present record and sentencing exposure on pending charges.**

Each has some merit. But another starting point may be to categorize they types of damning proof. One such category is "intrinsic"—an act or piece of evidence directly linked to the crime. This may include:

- **An admission/confession**
- **Motive evidence**
- **Identification proof left at the scene**
- **Your client's own behavior**

Dealing with intrinsic damning proof requires a search for its Achilles' heel: the confession has errors or wasn't recorded; the motive evidence is real but created police investigation tunnel vision or the motive evidence is too common or too

[1] "Judge Clears Distributors of Blame for Opioid Crisis in Hard-Hit County," NY Times, (Jul. 5, 2022).

banal to lead to this behavior by this individual; the identification proof has an innocent explanation for its presence or, again, is being overstated or overvalued; your client's behavior (drug use, intoxication) is not the culprit or is a human flaw that others had to take account of and respond to appropriately.

What might be "extrinsic?" 404(b) "other acts" evidence; a witness' criminal record available for impeachment; that prior statement that is starkly contrary to what will be said at trial. And how do we deal with these?

For the 404(b) "other act" proof, it must be fronted by the party whom it burdens. The main responses/explanations will be either that it was the other act evidence that distorted the investigation of the case and thus created tunnel vision or that this is a lifeline for an otherwise weak case. Nondisclosure is no solution—it destroys counsel's credibility and permits the other side to spin it. For the witness, the norm is to bring it out on direct and soften it contextually—but on occasion, the proponent of the witness may choose to ignore it, let the opponent bring it out on cross, and then attack them in closing with a "How dare they go so low, bringing up a drunk driving conviction as if that says anything about whether witness X would tell a lie."

And a starkly inconsistent prior statement? Again, it depends. If the witness has a great explanation, maybe wait until the impeachment occurs and then do "clean-up." Otherwise, beat your opponent to the punch.

Of course, the battle over that one piece of damning proof begins before trial with motions in *limine*. If exclusion does not result, a judge may nonetheless be amenable to "toning down" the proof. And then comes jury selection. A lesson from death penalty litigators bears consideration by lawyers in all categories of cases: front the problematic proof in *voir dire* questions. You will identify and possibly exclude those who will be most affected by it; you will educate jurors as to why *even with that proof* they must keep an open mind; and you may inure them to the evidence by repetition, as the more the jurors hear about it the less shocking it will be at trial.

These, then, are categorical responses to damning or devastating proof. What follow are individual essays illustrating strategies and successes. What may seem devastating is often not insurmountable.

—Jules Epstein

The views in this article are those of each individual contributor and do not necessarily reflect that of the National Institute for Trial Advocacy nor the organizations for which those contributors work.

Professor Elizabeth Lippy

Director of Trial Advocacy

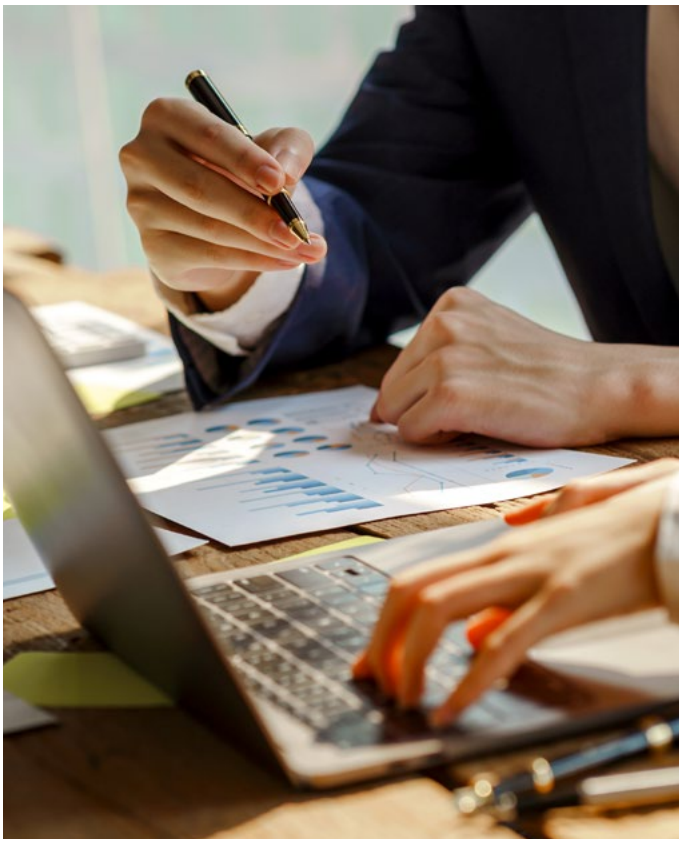
Temple University Beasley School of Law

"SPIN DOCTORS—MORE THAN JUST A '90S BAND"

Let's face it. Your case would not be going to trial if there wasn't at least one really damaging piece of evidence.

There's always at least one. The question is not whether there is, but how to best strategize and deal with that piece of evidence.

I often tell my law students that being an excellent trial lawyer is half preparation and half learning how to be a spin doctor. Merriam-Webster defines "spin doctor" as a person responsible for ensuring that others interpret an event from a particular point of view.[1] That's exactly what we, as trial lawyers, need to do: ensure the jury interprets an event from a particular point of view.



*****Trigger warning for my personal war story of an extremely damaging piece of evidence. This example is from a rape trial*****

The most damning piece of evidence I've had to spin was a wiretapped phone conversation in a rape case. The accusation against my client was that he had sexual intercourse with his ex-girlfriend while she was asleep or unconscious. The Commonwealth was savvy in their investigation and conducted a recorded, consensual, wiretapped phone call between the complainant and my client. In the 45+ minute phone call, the complainant accused my client of having intercourse with her while she was

[1] https://www.merriam-webster.com/dictionary/spin%20doctor.

asleep. In an ideal world, my client would have immediately denied said accusation. But, as you know, we do not live in an ideal world. Instead, my client remained silent for what felt like 20 minutes (it was more like 1+ minute) before finally stating something along the lines of "I'm sorry."

Yikes, am I right?

I knew this audio tape would be the worst piece of evidence presented against my client at trial. I had to spin the audio to my client's benefit and somehow overcome what could single-handedly convict my client of the very serious charge of rape of an unconscious victim.

My approach was to confront the evidence head-on—not just during the trial, but also during voir dire. During voir dire, I told the potential jurors about the audio recording and asked whether they could look at the big picture and all the circumstances instead of just one piece of evidence. I asked whether they ever said sorry for something they did not actually do. That helped me narrow down the best potential jurors.

Beyond addressing the evidence during voir dire, I discussed it during opening, examination of witnesses, and closing argument. My "spin" of the evidence was that this was a complicated and lengthy relationship, breakup, and flirtation after their breakup. During opening, I informed the jury that they would hear an audio recording of a phone call between the complainant and the defendant. I asked them to pay close attention to the audio tape to hear how they are essentially talking apples and oranges. During closing, I did not shy away from using the audio tape. Instead, I played portions of it to help illustrate what I told them during opening—that their conversation went in circles and never really addresses what the other is talking about.

Whenever the Commonwealth played the audio tape, I literally wanted to hide under the counsel table. It was excruciating to hear and uncomfortable for my client to sit through. Fortunately, though, my approach worked, and the jury essentially disregarded that one bad piece of evidence. When I spoke to a juror after the trial, I asked specifically about that audio. The jury agreed that the phone call did not make sense. The jury agreed that the complainant was talking about oranges whereas the defendant was addressing apples. That was a relief.

Accordingly, my advice is to never ignore the bad evidence, but to lean into it. Spin the evidence in a way that makes sense and help the jury interpret an event from a different point of view. Remember, especially in criminal cases if you are on the defense, that the prosecution has the burden of proof. Use that to your advantage when trying to spin that really damaging piece of evidence. If you're able to provide a reasonable alternative explanation for the piece of evidence, the burden is on your side. **Be the spin doctor.**

Professor Jared Hatcliffe

Senior Trial Counsel, *New York City Law Department*
Adjunct Professor, *Elisabeth Haub School of Law at Pace University*

Every case has its pros and, unfortunately, its cons. But one idea the best trial lawyers understand and share is that *almost any negative can be turned to a positive.*

Take alcohol for instance, which can often play a damaging role in the outcome of a trial. Attorneys can try to prevent the jury from hearing such issues through motions *in limine* or will get ahead of it and reduce the negative effects of hearing alcohol-related testimony with proper voir dire questions. However, a shrewd advocate can use potentially harmful, but admissible, evidence to their advantage.

For example, take a case of a police officer accused of excessive force in a wrongful death action. The officer claims the decedent smelled of alcohol and physically attacked him, forcing the officer to defend himself by striking the man, who falls to the ground striking his head on the pavement and suffering a traumatic brain injury.

Within hours of the altercation, police enter the injured man's room and draw his blood, without a court order or consent. The results indicate a high level of intoxication.

At the civil trial, the police department defends itself by seeking to introduce the results of the

toxicology test and argue the decedent was an "enraged drunk" who attacked the officer.

At first blush, this evidence seems damaging to the plaintiff's case. However, after losing a motion to preclude, a skilled plaintiff's attorney can, and did in this instance, use the evidence to their advantage. They did so by first arguing the police department acted immorally and unscrupulously by entering the hospital room of an unconscious man, handcuffed to his bed and bleeding from his brain, and drawing his blood without authorization and without the hospital's assistance.

The attorney went on to argue that if the tests were accurate, which no one could really know because an impartial medical specialist such as

the hospital had not drawn and tested the blood, then why was it necessary to use such force on an intoxicated man? Couldn't the officer have easily subdued him if he was so drunk?

By doing so, this attorney tapped into both the emotion of the jury, by eliciting their anger, and their common sense by using logic to change the narrative and by turning a negative piece of evidence into one that fit their theory of the case: a corrupt and abusive police department used unnecessary force on an incapacitated man.

Contrast that attorney with a different attorney's failed approach to alcoholic evidence. This set of facts involves another alleged use of excessive force by a member of a police department. Again, a toxicology test demonstrated an extremely high blood alcohol level of the plaintiff immediately following an altercation with police. On questioning during the direct examination by his attorney, the plaintiff testified he had drunk three to four Dixie® cups filled one-quarter with hard alcohol. The plaintiff's attorney brought in four of the same type of Dixie® cups to use as demonstrative evidence and put them on the jury box, then used a Sharpie to indicate how much of the cup had been filled. The attorney thought he had neutralized a potentially harmful piece of evidence by illustrating the alcohol consumption was not as substantial as the defense alleged.

During his case in chief, the young defense attorney outwitted the plaintiff's attorney by putting a toxicologist on the stand who testified not only to the amount of alcohol in the plaintiff's system at the time of the incident, but indicating that if the plaintiff had been drinking from these Dixie® cups,

and if they were only filled to one-quarter full, then the plaintiff would have had to have consumed over 14 Dixie® cups in a one-hour period.

As the toxicologist was testifying to the number of Dixie® cups, the able defense attorney began placing the 14 Dixie® cups on the ledge of the jury box, which grew to a number so high that the cups towered above the jury when stacked.

The lesson to be learned in dealing with damaging evidence is that it can often be turned to one's advantage if done in the correct manner. The above examples demonstrate both a right and wrong way to deal with such evidence.

Controlling the evidence will make or break your case, but there is only so much one can do, and it's the judge's discretion to determine the admissibility of evidence. But while every case has its share of damaging evidence, as the trial attorney you can turn that *negative into a positive if you embrace it and consider how it can fit into your narrative.*

Chris Dearborn

Director, *Suffolk Defenders Program*
Co-Director, *Trial & Appellate Advocacy Concentration*
Clinical Professor of Law, *Suffolk University Law School*
Of Counsel, *Rankin & Sultan*

When I first started as a rookie public defender in the mid-'90s, we had an expression around the office that "Nothing ruins a triable case like a confession."

We would brainstorm our respective case theories with pride and confidence—and then, inevitably, someone would pop our balloon by saying, "Now tell me about the confession."

About five years later, I learned the hard way that the only evidence worse than a confession for a criminal defense lawyer (I could at least try and blame that on the cops) was evidence of "consciousness of guilt." Pre-arrest or pre-charge flight or coverups were catastrophic to a criminal defense lawyer's case. Some prosecutors love to parrot the late Justice Antonin Scalia's arguably culturally insensitive reference to Proverbs 28:1 in *California v. Hodari D*: "The wicked flee when no man pursueth: but the righteous are bold as a lion." (My own response to Scalia's remark is not fit for print.) The jury instruction in my jurisdiction, the Commonwealth of Massachusetts (you know, the "last bastion" of liberal enlightenment, the home of John Adams—the justice warrior, not just the beer—and our brilliant state constitution that served as the progenitor for its federal cognate) was, and

still is, absolutely devastating. I lost a serious child rape case because my client had taken off in the middle of the case and was re-arrested in another jurisdiction two years later. To this day, I believe he was factually innocent. I had no idea how to deal with the consciousness of guilt evidence, the prosecutor's Cheshire Cat-like use of the evidence, or what to do about that heinous, burden-shifting standard jury instruction. Tragically, that individual is still serving 20+ years on the taxpayer's dime.

A year or two later, I saw my boss try a case with even worse consciousness-of-guilt evidence. His client took also took off but in the middle of the actual trial, so he had to put on what we call "an empty chair defense." My boss—all of about 5'4", with jet-white hair and glasses inspired by Mr. Magoo—was a creative and persuasive litigator. He delivered a brilliant and powerful closing, spending half of his argument suggesting that his client obviously had no faith in the system, no faith in the jurors, no faith in humanity, and he implored the jury "to prove him wrong." His pitch might have been toeing the line very closely between impermissible and permissible closing argument, but he was confronted with desperate times and responded with desperate measures in an effort save his client. It worked—and to the chagrin and shock of most of the courthouse, the jury acquitted his client.

Fast-forward a few more years, and trying to apply what I learned, I tried a similar tactic. My client Jose was an inner-city gang kid from Lawrence, Massachusetts charged with trafficking in a significant amount of cocaine. Lawrence is a culturally rich city once famous for its textile mills powered by the mighty Merrimack River. The city has a substantial immigrant population, predominately from the Dominican Republic, and a significant population of Spanish-speaking citizens and non-citizens. Jose was released on bail and took off. He was picked up on the warrant months later and held pending trial. But for the damaging consciousness of guilt evidence, he had a solid "lack of constructive possession" defense. There was only circumstantial evidence again him, although it was fairly strong circumstantial evidence (but thankfully no confession). As expected, the prosecutor made a big deal of his flight in his opening, and, of course, it was predictable he would do the same in his closing, and that the judge would support the government's argument by issuing the dreaded standard instruction. Under normal circumstances, I would have not let José testify in a million years in the case; he would not have needed to. I would have just argued reasonable doubt to our all-white, over-educated jury of his "peers" (surprise, surprise a city full of Black and brown people and my jury was all white, upper-middle class from affluent suburbs of Boston).

My client and I decided to put him on the stand to explain why he took off. José testified how the police had treated him in the past and how he had so many friends and family members who had been treated poorly by the system. He told the jury that he ran because he was afraid. I spent most of my closing describing José's

life, his interactions with the "system," and the pervasiveness of overt and subtle bias and racism that existed in his community. I argued he was terrified and never thought he had a prayer at a fair trial, that in his world he had no choice but to run, and I implored the jury "to prove him wrong." In Massachusetts state court we have no rebuttal in closings and the Government has last ups. Fortunately, the prosecutor spent far too much time trying to argue against my argument. The more he said José was wrong to mistrust the system and the more he argued that José took off because, again, "only the wicked flee," the more he lost the jury. When it was over, I am not even sure the jury remembered the case was about drugs. The jury acquitted.

To this day, this just verdict remains a personal highlight of my otherwise rather mediocre career as a trial attorney. (You know: "Those who can, do; those who can't, teach.") I like sharing this story with my Trial Ad, Clinical, and Evidence students, not to shine a light on a rare personal victory but, rather, because of the power of the lessons I learned from those experiences about storytelling, persuasion, bias, humanity, and, of course, a little bit of evidence.

John Singer

Adjunct Professor, *Trial Advocacy and Litigation Process, and Mock Trial Coach, University of Baltimore and George Washington University*
Retired Senior Attorney, *Federal Trade Commission*

THAT ONE REALLY DAMAGING PIECE OF EVIDENCE

This piece provides examples of three really damaging pieces of evidence; two of which were admissible and one — though inadmissible — that was quite amusing to me.

As context, all these examples come from cases I worked on during my 25 years as a prosecutor with the Federal Trade Commission (FTC).

1. The first example comes from an enforcement action, in which I was first chair, against a large national franchisor for making unsubstantiated earnings claims to prospective franchisees in violation of both the FTC Act and the FTC's Franchise Rule. The damaging evidence was one of the high points of a six-month long trial with almost 100 witnesses. After the FTC called 25 franchisees who testified that they received express earnings claims as part of the defendant's sales process, the FTC called as hostile witnesses several representatives of the defendant. The purpose of these hostile witnesses was to establish that while official company policy prohibited making earnings claim and that anyone who made such claims would immediately be fired were routinely violated — in fact, sales representatives regularly made express earnings claims in sales pitches and were never fired.

   One of the hostile witnesses was the owner/CEO of the defendant. The owner/CEO affirmed the company policy on earnings claims and that making claims would lead to immediate termination. The FTC then played an undercover tape made at a franchise show in which a sales representative (a childhood friend of the owner/CEO) made multiple express earnings claims. The owner/CEO initially tried to deflect the tape by saying the recording quality was a bit off and it was not clear to him that any earnings claim occurred (an objectively false assertion to everyone else in the courtroom). When then confronted, for clarity, with the transcript of the tape, the owner/CEO shifted to suggesting that perhaps the FTC forged the tape (the FTC had a very solid chain of custody from the making of the tape to its entry into evidence at trial). The owner/CEO of the defendant was a difficult, strong-willed individual. Though the defendant's very competent counsel received a copy of the tape and the transcript well before trial, I suspect that the owner/CEO simply could not accept what he heard, especially from a longtime

friend, and that he refused to work with defense counsel concerning the contents of the tape.

2. The second example comes from an appeal I handled in an enforcement action against a telemarketer. In what was then a typical procedure in enforcement actions, the FTC successfully petitioned the court to obtain an ex parte TRO that placed the defendant into receivership. The receiver obtained access to the defendant's server and shared its non-privileged content with the FTC, including emails. One email, from the owner to his protégé, was of particular note. In it, the owner laid out the methodology of the scam. Arguably more damning, however, was he set out how he kept the scam going over the years. The defendant explained that when he set up a boiler room and established a business entity in a state, he directed his telemarketers only to call consumers located outside of the state. The defendant reasoned that because many state Attorneys General often lack the resources to provide much focus on complaints from out-of-state consumers, it would take some time before enough out-of-state consumer complaints accumulated so that the defendant would start to feel some heat from the local authorities. When this occurred, the defendant would shut down the boiler room and the business entity and close all bank accounts. He would then move to another

state, restart the scam under new name and business entity, and set up a new local boiler room. The defendant boasted in the email he had already switched states several times and saw no reason why he could not continue this nomadic pattern for years to come. I am proud to say that my FTC colleagues, with a nationwide remit, traced down the defendant and the various iterations of his scam and put him out of business. This email was a key piece of the FTC's successful summary judgment motion. In opposing the SJ motion and on appeal, the defendant ignored the email rather trying to counter or explain it.

3. The amusing, but inadmissible, damning piece of evidence was a letter found by counsel for the receiver while reviewing documents located in the defendant's offices after the operator of a pyramid scheme, which used a travel-related hook to draw in victims, was placed into receivership created by an *ex parte* TRO. (The letter, from an attorney to the defendant, was segregated as potentially privileged upon its discovery by counsel for the receiver and was never referred to during the litigation.) Shortly before the FTC initiated its enforcement action, I received a call from the lawyer who wrote the letter, who represented he was an expert in travel law. He asked me if the FTC was conducting any investigations involving the travel industry. Consistent with FTC policy, I told him that I could neither admit nor deny the existence of any investigation. After being told this, the travel attorney spouted a listing of businesses in the travel industry (including the soon-to-be defendant) who he claimed to represent. The travel attorney then gave me his personal assurance that all his clients were legitimate and should not be of concern to the FTC.

In the travel attorney's letter discovered by receiver's counsel, he told the soon-to-be defendant that he had spoken with me, had assured me that all his clients (including the soon-to-be defendant) were legitimate, and that — as the result of the travel attorney's intervention — the soon-to-be defendant would not be the target of an FTC enforcement action. I can only speculate, but perhaps the travel attorney's letter was among the reasons that the defendant had millions of dollars in its bank accounts on the day its assets were frozen by TRO. As a footnote, the day after the unsealing of the TRO, the travel attorney (who did not represent the defendant in the enforcement action) left me a voicemail to ask if the FTC planned to bring enforcement actions against any of his other clients. Though, as a government attorney, I took it as a point of pride of being responsive to the public, I must admit that over 30 years later I have yet to return the call.

Professor Rachel Brockl

Director of the Litigation Center & Visiting Professor of Law

Golden Gate University, School of Law

HOW TO OVERCOME THAT ONE DAMNING PIECE OF EVIDENCE AT TRIAL

One of the most damning pieces of evidence for me was in a criminal case where the central item of proof was lost. Yes, you heard that correctly—lost!

I was trying a case where a young woman was charged with destruction of evidence (drugs) and resisting arrest. It was my job as the prosecutor to prove that this woman had destroyed or hid drug evidence that she knew would be used to further a police investigation or litigation. This was a tricky scenario because the officers did not handle the evidence effectively and the drugs were not tested before they went missing to confirm what the substance was.

In this case, the defendant was contacted as a passenger in a van at a Chevron gas station where she provided false paperwork for the vehicle. The driver was on federal probation, so the vehicle was searched. The defendant kept reaching down while sitting in the passenger seat, so she was removed from the van and stood near a patrol vehicle with another officer.

A short time later, a quarter ounce of suspected rock cocaine was discovered under the front

passenger seat, with some wrapped separately in cellophane. When shown to the defendant, she said it was for sales and not personal use. She also confirmed that it was “crack.” She was found to have $175 in small denominations on her person, which she claimed were from waitress tips. The officer standing next to the defendant placed the suspected drugs on the hood of the patrol vehicle. Suddenly, the defendant grabbed the rock cocaine off the patrol vehicle and shoved her arm into her pants. Officers struggled with her and commanded her to remove her arm several times. The defendant failed to comply, and the drugs disappeared.

A female officer showed up to conduct a more thorough search of the defendant in the Chevron bathroom, but she was unable to locate the cocaine. A strip search at the jail, including an internal inspection of the defendant's vagina, did not produce the cocaine. In fear that the defendant may have swallowed the large amount of drugs, she was taken to a hospital, but was cleared for overdose. Medical staff conducted a sonogram on Defendant with inconclusive results. Initially, Defendant refused to cooperate with a pelvic exam, but eventually agreed. The doctors were unable to locate the suspected drugs. Officers continued to look through trash bins and buckets of washing fluid, and searched with a K-9 unit at the Chevron, but they were still unable to find the missing cocaine. It was believed the defendant lodged the drugs inside of her vagina or threw them.

The defense's position was that these officers were not trustworthy, the officers lied about drugs ever having existed since the drugs couldn't have simply vanished, and even if a substance was initially found, how could we even be sure that it was cocaine since it was never tested. All valid points since this was a "he said/she said" case and we only had speculation about what the substance was.

This was an embarrassing case for these officers, and, quite frankly, I was a bit embarrassed for them. However, I did not shy away from the lazy policy that these officers implemented by placing precious evidence within reach of suspects who were not handcuffed. Normally, emphasizing an officer's embarrassing conduct is a tactic used most by defense attorneys and not prosecutors. But in this case, I highlighted the embarrassment that this department faced by losing a large amount of drug evidence that could have resulted in a felony rather than the misdemeanors the defendant was now facing. I noted the resources wasted to try to find the drugs and number of hours used toward fixing this blunder. I asked whether the department had changed their policy on how it collected and stored evidence at the scene of crimes after this incident. The department said it had; officers no longer put items of evidence on the hood of their patrol vehicles or within reach of suspects.

To combat the issue of not having the drugs tested, I put on evidence of these officers' background, training, and experience with drugs and drug sales. I had to hope the jury trusted these officers enough to believe their background and experience with drugs and that they could readily identify rock cocaine without testing it.

I pointed out that if the drugs for sale had not gone missing, this case would have been charged as a felony rather than a misdemeanor. I asked the jury what motivation these officers would have to do all this extra work—body searches, K-9 searches, gas station searches, testifying multiple days, etc.—just to have the defendant charged with a misdemeanor. It made more sense that the officers conducted this elaborate search because they wanted to cover their rear-ends for losing important evidence that could make the case a felony and they did not want to get reprimanded by their office.

I conducted a deep dive into the defendant's background to see if there was anything else that could help me with this case. I discovered that the defendant had been arrested for drug sales on four other occasions in another county. I ordered all the police reports and found that when the defendant was apprehended in most of those cases, she stuck her hands down her pants and the suspected rock cocaine disappeared. There was one case where a female officer retrieved the rock cocaine from the defendant's vagina and the substance was tested to confirm that it was indeed rock cocaine. I brought some of these cases in through California Evidence Code 1101(b) evidence to establish the defendant's motive to destroy the evidence, intention to conceal/destroy the evidence, and her knowledge that this evidence could be used in an investigation/litigation. The primary issues that the jurors would have to decide in this case were whether the defendant knew the rock cocaine would be used as evidence and whether she willfully destroyed or concealed the drugs. The judge allowed in some of these prior acts on this basis and several officers from a county over an hour away testified in this trial. The defendant did not testify in this case.

The result was a guilty verdict on all charges.

The one damning piece of evidence that would have easily convicted the defendant was if we had the rock cocaine, had it weighed, and tested it to confirm the identity. Instead, I was stuck with the damning piece of evidence that these drugs disappeared into thin air. I was forced to ask skeptical questions of the officers when testifying so that they could explain to the jury why they made certain, foolish, choices. I used a variety of arrows in my quiver, such as bringing in some of the defendant's prior acts that were like this case to show her intent and motive, and I went into overdrive using common sense arguments to appeal to the jurors' logical side. I believe jurors appreciate honesty. They like to know that when someone makes a mistake, they own it. If there was ever a case to use the defense theme for shoddy police work, this was it. But I exposed the issues early and had a candid discussion with the jurors about reasonable conclusions. In the end, justice prevailed.

The lesson from this case is that the one damning piece of evidence, or lack thereof, does not have to break your case. I have found that using honesty and creativity can help you surmount many difficult trial obstacles. Sometimes you just have to work with what you have—or in my case, what you don't.

Professor H. Scott Fingerhut

Assistant Director, *Trial Advocacy Program*
Florida International University College of Law
Faculty Fellow, *The Honors College, Florida International University*

BULLSEYE

What to do when every piece of evidence against you is damning, but only circumstantially — only *arguably* so?

The case may be civil or criminal. And the proponent may carry the burden of proof or persuasion, or merely be impeaching credibility.

The common thread is that the other side is arguing every inference from every fact to place your client (and everyone and everything about them) in the worst — in the *ugliest* — possible light, twisting and turning the testimony and physical evidence to suit their theory. Yes, like a square peg into a round hole.

It happens in every case — and to a client of mine in a second-degree murder trial, one of those classic, chaotic, street brawls, with the ultimate question hanging in the balance: basically, who shot J.R.?

It *had* to be the client, the prosecutor argued, relying on their "mountains" of inference and the inevitable lack of coincidence. "Look how bad all of this smells!" they said.

Well, damning evidence be damned. An acquittal was but moments away. And (I'd like to believe) this end to my closing argument helped to seal the deal (with all credit and thanks to Judge Bob Scola, who bequeathed me the metaphor, which goes something like this):

You know, it's the state's job to prove its case beyond a reasonable doubt. Not an easy thing to do. Nor should it be. In fact, trying to prove a case beyond a reasonable doubt is a lot like trying to hit a bullseye, at a distance. Dead center. Solid perfect. Also not an easy thing to do. But that, members of the jury, is what proving guilt means in this courtroom, in this country: it means you have to hit a bullseye.

But today, that's not what happened.

The state missed the mark.

They want you to believe they hit a bullseye.

But it's an illusion.

And we all see the trick.

If you take an arrow, stick it in the ground, and draw a target around it, you hit a bullseye every time.

Charles Rose

Dean

Ohio Northern University College of Law

"FLIP IT TO WIN IT"

The most successful technique I've used when dealing with the one really damaging piece of evidence is to "flip it."

This works best with a fact that is central to the case that you cannot avoid. When there's no way to make it something else, you must deal with it head-on. You must flip it to win it. The way in which you flip it must be memorable and bear the burden of credibility. It is a true storytelling opportunity. To work, the flip must be believable, connect seamlessly to the situation, and provide an alternative meaning. I have had the most success when the flip fed into the jury viewpoint and implicit bias. When you can connect the flipped piece of evidence to their life experiences, it resonates with them, and the jurors are more likely to believe it.

Eugene Pincham, a famous Chicago Defense attorney, used the story of the other side of the hand when asking the jury to pay attention to the defense case. This is not a bad way to compare two opposing sides, but it isn't what I mean by flipping it. When you flip an idea, you take facts that you can't run away from and you provide an alternative lens through which to view those facts. If the alternative makes more sense to the jury, they will adopt it as part of their story of the case. If it doesn't though, your case is done. Like most powerful advocacy techniques, the devil is in the details. Let me share with you a story from my own trial flip.

Way back in the dark ages, long before the advent of cell phones and the ubiquitous nature of Apple, I was the senior defense counsel at Fort Benning, Georgia. I led a team of four lawyers who represented soldiers throughout the southeastern United States. I had been on the job about a month when a young specialist came into my office. He was facing a court martial for disrespect toward a noncommissioned officer (NCO). He was part of the medical platoon and spent the previous month working safety on the ranges at Fort Benning. He was the guy sitting in the truck or the tracked vehicle with the white red cross painted on the side. His job required him to be available continuously for safety reasons. He was the first responder in the event of an explosion or live fire accident.

This young man had been on continuous duty for approximately 30 days, living in his track, and eating MREs (meals ready to eat). When he was finally relieved, he came back to the platoon area to check the duty roster for the next week where he discovered that he was scheduled to work

the next weekend. As you might imagine, this young man was not amused. He became angry, cursing and throwing items around the platoon break area. He did this in front of the platoon sergeant and his squad leader, who was also an NCO. At the time, the break area was filled with other soldiers from the platoon who observed this behavior.

Disturbed by the young man's actions, the platoon Sergeant locked him up. This is a military phrase that means put him at the position of attention. My client complied with the platoon sergeant's order. He stood at attention, trembling but quiet. The platoon sergeant then approached the soldier and dressed him down verbally for his behavior. The young man's face turned red and visibly moved, but he still did not say anything.

After the platoon sergeant had completed this "verbal counseling," he told the young man to stand at ease. When you tell someone to stand at ease in the military you are asking them to assume a modified position of parade rest with their hands behind their back. The sergeant then put his hand on the young man shoulder, asking "What's going on? Please tell me why you are so upset." At this point, the young man loses his composure completely. He makes multiple comments about the platoon sergeant's parents and grandparents, calling into question their potential identity as a species other than human. The platoon sergeant was not amused and called the military police. The young man was arrested, charged with disrespect toward a senior noncommissioned officer, and brought to my office.

The command charged my client with disrespect towards a senior noncommissioned officer and failure to follow a lawful order. We were going to trial in a month, and the facts were not controverted. My client admitted to me that he had called into question the parentage of the senior noncommissioned officer and basically destroyed the platoon break area in a fit of anger. He refused, however, to plead guilty. From his perspective, he was in the right to speak his mind after the platoon sergeant had played favorites and placed him on the duty roster again after he just spent 30 days on the range. He could not imagine that a jury would find him guilty. I informed him otherwise. Nonetheless, the client decides, and we went to trial.

The facts were the facts. We had a defense called divestiture of authority, but for it to work, I had to convince the jury that my client's actions were justified and that they made sense in that situation. This was a jury of senior officers and NCOs who would never accept his behavior if confronted with it themselves. Somehow, I had to show that the way he acted and the things he said were justified. He went from the position of attention to verbal violence in a moment — how could I flip it to establish divestiture? This is what I did.

Members of the jury, I was on my way to the court today to make this closing argument. We've all heard the facts in this case, and no one disputes them. I'm driving down the road trying to come up with an argument that allows you to understand my client's actions. Let me tell you, as I drove down the road this morning, I was in a tight spot. This is my first trial in this jurisdiction and my first one as the new senior defense counsel here at Fort Benning, and I've got nothing. I wasn't paying a lot attention to my speed limit and had just passed a formation running on the road. Suddenly, blue lights were flashing in my rearview mirror. I looked down and I'm going at least 10 miles over the speed limit when passing formations. My entire body clenched. I started sweating, gripping the steering wheel tightly, trying to figure out what I'm going to say the MPs. The squad car passed me by, sirens blaring and lights flashing. My entire body relaxed, endorphins flooded my system and I had to pull over to the side of the road and compose myself. The relief was so palpable I couldn't drive. Members of the jury, that is exactly how my client felt when his NCO put his arm on his shoulder and said, "What's going on? Please tell me why you are so upset." In that moment, he divested himself of his authority and became just a dude asking my client what was up. He reacted like I did on the road, losing control because the stress of the moment had passed him by . . . .

This flip worked because everyone at Benning had experienced the MPs, their speed traps, and the frustrations of driving around running formations. My flip resonated with the jurors' own experiences, and they acquitted my client. If you can flip it, you can win it — but you need to go big or go home when you try.

Jules Epstein

Edward D. Ohlbaum Professor of Law

Director of Advocacy Programs, *Temple University Beasley School of Law*

They laughed. The jury laughed. They laughed discreetly, covering their mouths or ducking their heads. But they laughed. They laughed as the prosecutor cross-examined that rarest of witnesses, a defendant in a criminal trial testifying on their own behalf.

I don't want to suggest that it was right — indeed, it was ultimately a product of insensitivity. But it was certainly understandable. The prosecutor demolished the witness, twisting both the individual and their story into pretzels. The witness was made to be a fool.

In a panic. I turned to Paul Messing my Public Defender colleague and one of the greatest trial lawyers I have every known. What do I do?

Paul's counsel was calming and sage. It played out in the closing like this:

When my client testified, I saw many of you laugh.

I get it. The prosecutor's questions made him seem the fool.

But perhaps that wasn't hard. A veteran prosecutor, one with twelve years of school, four years of college, three years of law school, and countless trials, was able to question a poor,

poorly educated man. Making us want to laugh because it seemed so foolish.

But being a fool is not the same as being a robber. So please go with me beyond that, because when you look at the failings in the prosecution case — the police mistakes, the changes in description, the absence of a single objective piece of proof showing this man to be not the fool but the robber — you will see that the answer to the question the Judge will pose, the only question in this case, whether the prosecution with its power, its skill, and its knowledge proved beyond a reasonable doubt that [name] was the person who . . . .

A little humility, the tiniest bit of shaming, a refocus on what the case was really about. I can't tell you which of these factors had the most weight, but whatever degree of fool my client was in demeanor and testimony the jury was not fooled — there was no proof beyond a reasonable doubt and no conviction.