Presented:
Page Keeton Civil Litigation Seminar

November 2-3, 2017
Austin, Texas

DEALING WITH BAD FACTS

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DEALING WITH BAD FACTS: MAKING LEMONADE FROM LEMONS

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"You'll have to look for another lawyer to handle the case, because the whole time I was up there talking to the jury, I'd be thinking, 'Lincoln, you're a liar!' and I just might forget myself and say it out loud."

ABRAHAM LINCOLN
to a prospective client

I. INTRODUCTION

On a daily basis in courtrooms across the state, trial lawyers face tough strategic choices concerning bad facts in their cases. Every case has bad facts, to a greater or lesser degree, and the opponent *always* has points to make. There may be damaging admissions, prior inconsistent statements, violations of policies and procedures, facts supporting contributory negligence, prior injuries, delays in treatment, criminal records or other bad facts that come into evidence. The first line of defense is the filing of a motion in limine. Assuming that fails or that there is no legitimate argument to support the exclusion of the bad evidence, what is the best way to deal with the evidence? When is the optimal time to deal with the bad evidence? Is it best to deal with the bad evidence only after the opponent introduces it, or is it better to "inoculate" the jury against the bad effects of the evidence by first introducing it in a weakened form? The conventional wisdom, taught for many years in law schools and contained in numerous articles and books on trial procedure by eminent trial lawyers, is that inoculating the jury at an early stage is the preferred approach. In the past ten years, however, a vocal minority of commentators created confusion on the issue by mounting a fierce assault on the conventional thinking. Most notable were the proponents of a theory of "sponsorship--" a theory that the jury penalizes, and does not reward, the party who sponsors the bad evidence. *See* R. Klonoff & P. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* (1990). Fortunately, empirical testing of the relative merits of the inoculation and sponsorship theories provides definitive guidance to the trial lawyer and confirms the unambiguous superiority of one theory--the inoculation theory.

The strategy of inoculation offers a tested, effective approach to dealing with bad facts, but does it come at a price? Must a trial lawyer who preemptively discloses bad facts to a jury

in order to maximize the chances of prevailing at the trial court level forego a later appeal predicated upon the trial court's decision to allow the jury to hear about the bad facts? Is it possible to take the sting out of bad facts at the trial court level without getting stung on appeal? The answer, unfortunately, is not as clear as it might be, particularly in light of a recent United States Supreme Court decision, *Ohler v. United States,* 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed.2d 826 (U.S. 2000). While it arguably offends a sense of justice and fair play to require trial lawyers to choose between inoculation and the preservation of error, the trial lawyer may face just that choice. There are, however, a number of practical steps that the inoculating trial lawyer may take at the trial court level in order to maximize the chances of error preservation for a future appeal.

II. INOCULATION THEORY

Most trial lawyers were trained to inoculate the jury against bad facts--disclose the facts to the jury early in weakened form in order to lessen the impact in the eyes of the jury and to enhance credibility. This strategy has been referred to by commentators variously as "inoculation," "preemption," "volunteering weaknesses," "confessing your sins," "pull[ing] the tooth before it infects the case during trial," airing "dirty laundry," "put[ting] the weakness in the best light," "tak[ing] its sting away," and "revers[ing] a weakness so that it becomes a strength." *See, e.g.,* Rice & Leggett, "Empirical Study Results Contradict Sponsorship Theory," 7 No. 8 Inside Litig. 20 (1993); Linz & Penrod, "Increasing Attorney Persuasiveness in the Courtroom," 8 L. & Psych. Rev. 17-25 (1984); McGuire & Papageorgis, "The Relative Efficacy of Various Types of Prior Belief-defense in Producing Immunity Against Persuasion," 62 J. Abnorm. & Soc. Psych. 327 (1961); D. Vinson, *Jury Persuasion: Psychological Strategies and Trial Techniques* 127 (1993); Weitz, "Direct Examination of Lay Witnesses," in *Excellence in Advocacy* 598 (1992); T. Mauet, *Fundamentals of Trial Techniques* 95 (1980); E. Wright, *Winning Courtroom Strategies* 35 (1994); J. Rogers, *Anatomy of a Personal Injury Lawsuit* 225 (3rd ed. 1991); J. McGehee, *The Plaintiff's Case* 23 (1997); R. Herman, *Courtroom Persuasion* 265 (1997)

Gerry Spence explains the rationale for inoculation-type theories in this way:

> Concession is a proper method both to establish credibility ... and to structure a successful argument successfully. I will always concede at the outset whatever is true even if it is detrimental to my argument. Be up-front with the facts that confront you. *A concession coming from your mouth is not nearly as hurtful as an exposure coming from your opponent's*. We can be forgiven for a wrongdoing we have committed. We cannot be forgiven for a wrongdoing we have committed and tried to cover up. A point against us can be confessed and minimized, conceded and explained. The *Other* will hear us if the concession comes from us. But the *Other* retains little patience for hearing our explanations *after* we have been exposed.

J. Spence, *How to Argue and Win Every Time* 131 (1995) (emphasis in original).

Spence is far from the only commentator who supports inoculation, in one form or

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