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## **BAD FACTS: MAKING LEMONADE FROM LEMONS**

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Personal Injury - Texas Board of Legal Specialization  
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International Academy of Trial Lawyers - Fellow  
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*The Best Lawyers in America* - Personal Injury Litigation 2014-Present  
*Texas Monthly Super Lawyer* - 2003-Present (Top 100 Super Lawyers in Texas 2013-Present)  
*Lawdragon Magazine* - 500 Leading Plaintiffs' Lawyers 2007; 500 Leading Plaintiffs' Consumer Lawyers 2019, 2020  
*D Magazine* - Best Lawyers in Dallas 2014-Present  
Texas Trial Lawyers Association – President 2022  
American Board of Trial Advocates, Dallas Chapter - President (2017) & National Executive Committee Member (2022)  
Dallas Trial Lawyers Association - President 2007-2008  
Association of Plaintiff Interstate Trucking Lawyers of America – President 2018  
AV-Rated Preeminent - Martindale-Hubbell  
Standing Ovation Award - State Bar of Texas CLE Program  
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State Bar of Texas Pattern Jury Charge Committee - Business, Consumer & Employment 2007-2009

## **Publications**

"The Empathy Deficit in Pajama-Clad Online Jurors," *The Advocate*, Spring 2022; "Forced Arbitration: A Bitter Pill to Swallow," *Tex. Law* 2022; "A Primer on Non-Subscribers," *Tex Law* 2022; "Lyft Belatedly Issues Troubling Sexual Assault Report," *Tex Law* 2021; "Lessons From the Kennedy Assassination About Eyewitness Testimony," *Tex Law* 2021; "Employer Liability for an Employee's Assault," *Tex Law* 2021; "Cross-Examining Experts Under the New Rules," *Tex Law* 2021; "The Case Against Mandatory Online Jury Trials in the Time of Corona," *Tex BJ* (2021); "Tesla's Full Self-Driving Capability: Unsafe at Any Speed," *Tex Law* 2021; "New Texas Rules Bring More Expedited Trials and Federalization to Personal Injury Cases," *Tex Law* 2021; "Dram Shop Cases: Rattlesnakes Loose in Shopping Malls," *Dallas Bar Assoc Headnotes*, Dec 2020; "Should Democrats Pack the Supreme Court if Biden Wins," *Tex Law* 2020; "Collision Avoidance Technology Systems Should Now be Standard Equipment on All Large Trucks," *Tex Law* 2020; "Mandatory Online Jury Trials: An Idea Whose Time Has Not Come," *Tex Law* 2020; "The GOP's COVID-19 Immunity Bill: Unfair, Unnecessary and Unsafe," *Tex Law* 2020; "Screeching Halt: Lyft and Uber Putting Profits Over Safety of Passengers," *Tex Law* 2020; "Law in the Time of Corona," *Voir Dire*, Spring-Summer 2020; "Truck Driving Could be the Next New Desk Job," *Tex Law* 2020; "COVID-19 Lawsuit Immunity: When Nobody is Accountable, Nobody is Safe," *Tex Law* 2020; "Law in the Time of Corona," *Tex Law* 2020; "Fifth Circuit Blesses 'Snap Removal' by Out-of-State Defendants," *Tex Law* 2020; "Preparing the Plaintiff to Testify," *The Advocate*, Spring 2020; "Liability When the Uber or Lyft Driver is an Outlaw," *Tex Law* 2019; "When an Autonomous Vehicle Crashes, Who Pays for Damages?" *Tex Law* 2018; "Setting the Table in Catastrophic Truck Crash Cases," *Tex Law* 2017; "Buckle Up: Seat Belt Evidence Now Admissible," *Tex Law* 2017; "Joint and Several Liability for Indivisible Injuries," *Tex Law* 2017; "Holding Trucking Companies Directly Liable," *Tex Law* 2016; "13 Must-Ask Questions Before Enlisting an Expert Witness," *Tex Law* 2016; "Five Ways to Impeach a Witness," *Tex Law* 2016; "New Day in Federal Civil Procedure," *Tex Law* 2016; "The Collateral Source Rule's Exception," *Tex Law* 2015; "Impact of Convictions in Civil Trials," *Tex Law* 2015; "Experts and Inadmissible Underlying Data," *Tex Law* 2015; "Hurdles for Premises Liability," *Tex Law* 2015; "Parallel Criminal and Civil Cases: Which Goes First?" *Tex Law* 2015; "New Approach to Prior Inconsistent Statements," *Tex Law* 2015; "The Unlawful Acts Doctrine in Texas: Dead or Alive?" *Tex Law* 2015; "Phantom Defendants: Responsible Third Parties," *Tex Law* 2015; "Clearing a Hurdle In Bystander Cases," *Tex Law* 2014; "Information Acted On Is Not Hearsay," *Tex Law* 2014; "When is Enough Enough? How to Prove Causation With Temporal Proximity and Lay Testimony," *Tex Law* 2014; "How to Win Wrongful-Death, Survival Damages," *Tex Law* 2014; "Personal Injury: *Stowers* and Multiple Defendants," *Tex Law* 2013; "Maximize the Effectiveness of Opening Argument," *Tex Law* 2013; "Admissibility of Other Similar Incidents in Civil Litigation," *Tex Law* 2013; "Innocent-Retailer Protection, Jurisdiction and Removal," *Tex Law* 2013; "How to Break Down Issues in Component-Parts Cases," *Tex Law* 2013; "Understanding the Dram Shop Act's Safe Harbor," *Tex Law* 2013; "Fear of Commitment Questions in *Voir Dire*," *Tex Law* 2012; "What Attorneys Can't Say In Closing Arguments," *Tex Law* 2012; "How to Handle Physical and Mental Examinations," *Tex Law* 2012; "Objecting to the Admission of Harmful Evidence," *Tex Law* 2012; "Tactical Considerations in Depositions," *Tex Law* 2012; "Deposition Strategies in State and Federal Court," *Tex Law* 2012; "Overcome Fear Factor in Adverse Expert Cross-Examination," *Tex Law* 2011; "Seven Deadly Myths of Cross-Examination," *Tex Law* 2011; "Think Strategy in a Post-H.B. 274 World," *Tex Law* 2011; "Questions to Ask Police Officers in Car Wreck Cases," *Tex Law* 2011; "Set-Aside Scuffles," *Tex Law* 2010; "Trial Lawyer as Secret Agent: Techniques Litigators Can Learn From Spies and Detectives," *Tex Law* 2010; "My Atticus Finch Moment," *Tex Law* 2006; "Time Limits on *Voir Dire* Trade Justice for Efficiency," *Tex Law* 2005; "Factual Sufficiency Review by the Supreme Court," *Tex Law* 2005; "The New Good Samaritans: HB 4's Protections for Emergency Medical Care," *Tex Law* 2004; "Why do Jurors Blame the Victim?" *Trial* (Dec. 2003); "*Palacios* and Article 4590i Expert Reports," *Tex BJ* (2002); "A Reply to a Flawed Defense of Sponsorship Theory," *Tex BJ* (2000); "Inoculating Against Bad Facts" *Tex BJ* (2000); "Admissibility of Criminal Convictions in Civil Cases," *Tex BJ* (1998); "Non-Subscriber Liability for Employee Injuries" *Tex BJ* (1997).

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## DEALING WITH BAD FACTS: MAKING LEMONADE OUT OF LEMONS

Quentin Brogdon

“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 another. Howard Nations believes that the theory of inoculation derives from Aristotle’s second principle of persuasion--maximize your salient points and minimize your weaknesses. H. Nations, *Powerful Persuasion* 1 <http://www.howardnations.com/covr-toc.html>

Nations justifies inoculation in the following manner:

*By directly addressing your weaknesses before the opponent gets the opportunity to do so, you are able to weaken the attack and choose the language with which the weaknesses will be first discussed to the jury. This will convey the important and accurate impression that you are being straightforward and honest with the jury which enhances your own most important characteristic, i.e., credibility. By openly revealing weaknesses in your case and carefully couching your discussion of them, you may successfully inoculate the jury against the inevitable attacks by your opponent. Id.*

A third commentator advocates inoculation for the following reasons:

*Ordinarily if the harmful evidence is directly related to the issues in the case and is a matter that in all probability your opponent will inquire about on cross-examination, it is preferable to produce it on direct examination. It can be offered at a time and manner in the course of the examination that tends to minimize it rather than*

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