INOCULATING AGAINST BAD FACTS

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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.\footnote{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.* 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.”

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.

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

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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. 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.

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 dramatizing it. Although your opponent probably will make additional inquiry on cross-examination, regardless of your proving the harmful evidence, the effect is likely to less spectacular than it would have been if the direct examination had been silent on the harmful subject. Also, there is a tactical advantage in taking the position before the jury of willingness to produce all of the facts, facing frankly any unfavorable elements. And, finally, you may minimize the harmful effect of the evidence by offering immediately whatever mitigating explanation is available, rather than having the harm accentuated by a determined pursuit of the matter on cross-examination for a length of time and in ways that develop a strong impression on the minds of the jurors before the explanation is offered.

In *Ohler v. United States*, a recent case addressing the issue of whether a party who preemptively introduces evidence of a criminal conviction on direct examination waives the right

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6 *Id.*
7 R. Keeton, *Trial Tactics and Methods* 54-55 (2d ed. 1973). *See also* Weitz, “Direct Examination of Lay Witnesses,” in *Excellence in Advocacy* 598 (1992) (“There are three reasons for such a rule. First, by revealing this unfavorable information, you [and vicariously, your client] project the impression of being reliable, frank and determined to reveal the whole truth, even if it should prove to be embarrassing. Second, you defuse the information and remove a weapon from the cross-examiner’s arsenal. Opposing counsel cannot “reveal” it in a less flattering way on a cross-examination: by then, the information is not new anymore, and the jury is less sensitive to the issue. Third, if the information is indeed bad or unflattering, you can be sure that it will come out anyway. You are better off revealing it in a manner of your choosing rather than ceding the initiative to your opponent.”)
8 *Ohler v. United States*, 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed.2d 826 (U.S. 2000). This paper addresses *Ohler* in detail in a later section.
to complain about the admission of the conviction on appeal, Justice Souter acknowledged in his dissenting opinion:

It is true that when convictions are revealed only on cross-examination, the revelation ... warns the factfinder [concerning the witness’s readiness to speak truthfully], but the timing of their disclosure may do more. The jury may feel that in testifying without saying anything about the convictions the defendant has meant to conceal them. The jury’s assessment of the defendant’s testimony may be affected not only by knowing that she has committed crimes in the past, but by blaming her for not being forthcoming when she seemingly could have been. Creating such an impression of current deceit by concealment is very much at odds with any purpose behind Rule 609, being obviously antithetical to dispassionate factfinding in support of a sound conclusion.⁹

Dr. Donald Vinson, a noted trial consultant, believes that inoculation is effective because it spurs jurors to begin creating self-generated counter-arguments to the opponent’s arguments based upon the bad facts.¹⁰ Dr. Vinson believes that inoculation is most effective when it is supplemented with counter-arguments that the jury may not generate on its own.¹¹

Even some commentators who favor inoculation as a general principle caution against its automatic application with respect to all weaknesses in a case. Thomas Mauet, the author of a popular handbook on trial techniques in use at many law schools, concedes that the conventional wisdom of volunteering weaknesses is “useful as a general proposition,” but he cautions that “its intelligent application to any given witness is difficult.”¹² Among the factors that Mauet says must be weighed before any weakness is disclosed on direct examination are: (1) How damaging is the weakness? (2) Does your opponent know about it? (3) Will this weakness become apparent during the course of the direct examination? (4) Can you gracefully volunteer the weakness? (5) Is the weakness admissible during the direct examination? and (6) Does your opponent have trial skills which can effectively expose the weakness during cross-examination?¹³ Mauet and other commentators agree that weaknesses, in the event that they must be disclosed, are best disclosed in between strong points in the case, due to the potency of primacy and recency points in the jurors’ minds.¹⁴

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⁹ Ohler, 120 S. Ct. at 1857. Souter was joined in his dissent by Justices Stevens, Ginsburg and Breyer.


¹¹ Id.


¹³ Id. at 96.

¹⁴ Id. See also R. Herman, Courtroom Persuasion 265 (1997) (“I often look upon disclosure as a Strong-Weak-Strong structure ... Give a strength, disclose a weakness and end with a strength.”); S. Lubet, Modern Trial Advocacy 430 (2d ed. 1997) (“...negative information should not be mentioned until you have laid out all of the positive facts about the witness. If you believe that you must defuse a ticking bomb, do it quickly and without fanfare.”).
Although commentators may differ in rationales for the utilization of a strategy of inoculation and viewpoints concerning the appropriate times for such a strategy, the weight of authority in favor of inoculation is overwhelming.  

III. SPONSORSHIP STRATEGY THEORY

Can all of the commentators who favor inoculation be wrong? Is the conventional wisdom nothing more than unsupported dogma that trial lawyers blindly follow because it has been repeated enough times that it has developed a life (and a constituency) of its own? In 1990, two former Assistant United States Attorneys, Robert Klonoff and Paul Colby, argued just that and turned conventional wisdom on its ear when they authored a book entitled, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials. In their book, Klonoff and Colby forcefully advocated a “sponsorship” theory which dictates that attempting to inoculate against bad evidence and witnesses by “sponsoring” them—introducing the evidence or calling the witnesses—actually may magnify the harmful effect of the bad evidence and testimony. The problem according to Klonoff and Colby is that eliciting the harmful evidence concedes materiality and magnifies the harm “because the jury thinks that it is seeing the harmful item packaged in the light most favorable to the advocate’s case.” Jurors know that a lawyer “will never confess that he should lose a case, and so it will be skeptical of his attempts to gain

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17 Id. at 94-105.  

18 Id. at 103.
credibility by exposing weaknesses.”19 The jurors always expect the lawyers to be hired guns and the jurors conclude that the introduction of bad evidence is “a harmful concession of no better evidence.”20

There are three basic lessons of the sponsorship strategy: (1) do not fear the opponent’s exploitation of your failure to introduce weak evidence, “as long as the item of evidence in question is equally available for use by the opponent and the jury is aware of that availability,” (2) you should introduce even favorable evidence only if the evidence is strong enough to outweigh the “costs” of sponsorship, and (3) you should at all times seek to shift the “costs” of introducing the harmful evidence by inducing the other side to introduce the evidence.21

Predictably, given that Klonoff and Colby’s book was contrary to the conventional wisdom, commentators criticized the book. There were two particularly scathing reviews of the book in the Yale Law Journal.22 One review criticized the book in the following terms:

On what basis do the authors claim that jurors react one way or another to the introduction of evidence? On what basis do they assert that jurors discount evidence because they believe it has been “packaged”? What basis is there for concluding there is any price to be paid, for example, when one party places in evidence the criminal record of a witness testifying against it? The book cites no social science data. It relies on no scholarly studies of jury behavior. While the authors have tried scores of cases, they rarely cite to them and more rarely still even seek to demonstrate by example how they used their strategy to win cases they think they otherwise would have lost. In fact, one of their criticisms of previously published trial practice books--that “when an issue arises that happens to be addressed in a manual, the reader is expected to accept the advice wholly on faith”--applies to a considerable degree to their own book.23

The reviewer then cited three famous cases that allegedly supported inoculation--the Alger Hiss trial, the Jean Harris trial (the Scarsdale diet doctor murder case), and a defamation case involving Wayne Newton.24

The second Yale Law Journal reviewer argued that sponsorship theory as a theory of behavioral science is flawed and “upside down” because it “is inductive when it should be

19 Id. at 98.
20 Id. at 36-37.
21 Id. at 63-68.
24 Id at 1165-75.
deductive,” and it “begins with general principles from which it derives assertions about specific phenomena, instead of beginning with well-established phenomena of persuasion and then developing an abstract theory to explain them.”25 The reviewer criticized Klonoff and Colby for doing nothing to empirically test their theory after they arrived at the premises of the theory.26

In a subsequent law review article, Klonoff and Colby responded specifically to the two Yale Law Journal reviews of their book.27 They argued that such “harsh criticism” was to be expected because their book “challenges the foundations of long-accepted views.”28 With respect to the first reviewer’s criticisms, Klonoff and Colby argued that each of the three famous cases cited by that reviewer: (1) actually had results that would have been predicted by sponsorship theory, or (2) constituted “no test of sponsorship theory.”29 Klonoff and Colby further argued that, contrary to the reviewer’s criticism that the book minimizes the risk that an opponent will use the failure to call a harmful witness against a party, the book does acknowledge that a lawyer representing a party may harm that party by failing to call a witness perceived by the jury to be in that party’s camp—a “party-associated witness.”30 With respect to the second reviewer’s criticisms concerning the inductive nature of sponsorship theory and the lack of empirical data to support the theory, Klonoff and Colby argued that the criticism was based upon “overthrown scientific principles” and that “[i]t has never been a requirement that theory’s predictions—even ones with highly significant implications—be verified prior to announcement.”31

The reaction of a few commentators to Klonoff and Colby’s book and the theory of sponsorship was positive.32 No commentator, however, cited any empirical support for the theory.

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26 Id. at 1183.
29 Id. at 459-67.
30 Id. at 465-66.
31 Id. at 471 & 475.
32 See Leonard, “Book Review,” 45 Fed. Law. 54, 55 (1998) (“I agree with Klonoff and Colby’s conclusion that a trial attorney will, as a rule, ‘be better off limiting his presentation to his best evidence, which is what the jury expects of him in the first place.’”); Hanley, “Getting to Know You,” 40 Am. U.L. Rev. 865, 873 (1991) (“In their insightful book, Klonoff and Colby share my opposition to divulging the weakness of a case .... I agree with Klonoff and Colby that the effectiveness of voir dire as a mechanism for detecting potential jurors’ reaction to weak evidence is questionable at best.”).
IV. THE EMPIRICAL DATA

One respected trial manual last updated in the 1990's states that “there have been no objective studies that validate” either inoculation or sponsorship-type theories. That is no longer true, if it ever was. Indeed, Klonoff and Colby, in their response to the Yale Law Journal reviews, invited such testing when they stated, “[w]e welcome formal testing of our theory and are confident that the results will support it.” Empirical testing both inside and outside the courtroom setting now provides unambiguous support for a strategy of inoculation over a strategy of sponsorship.

A. Rice/Leggett Study

The strongest empirical evidence in support of an inoculation strategy is a 1993 study conducted by two jury consultants. They conducted an empirical study to evaluate “which is more advantageous--the strategy of revealing negative information (inoculation) or the strategy of withholding negative information (sponsorship).” The consultants started with the premise that traditional inoculation theory predicted two key reactions: (1) jurors would be less persuaded by defense arguments if the plaintiff’s attorney “softened the blow” by introducing the negative case facts first, because the element of surprise is removed and there is an opportunity to offer an explanation or contrary evidence, and (2) the plaintiff’s attorney should gain credibility in the eyes of the jury by providing the jury with a complete and balanced picture.

The consultants employed a set of facts involving a crash-worthiness suit against the

33 S. Lubet, Modern Trial Advocacy 430 (2d ed. 1997).
37 Id.
38 Id.
manufacturer of a vehicle by the family of a man who was killed when the vehicle overturned. The bad facts from the plaintiffs’ viewpoint were that the dead man had been seen drinking alcohol at a party before the crash and autopsy results confirmed that he had alcohol in his blood at the time of his death. The experiment used two groups of 75 jury-eligible adults—an inoculation group and a sponsorship group. Each group saw videotapes of plaintiff and defense opening statements. Each group saw the same defense opening statement—a statement that made full use of the damaging facts concerning the drinking. The sponsorship group, however, saw a plaintiff’s opening statement that scrupulously avoided any mention of the drinking before the crash, while the inoculation group saw a plaintiffs’ opening statement that mentioned the drinking, but stated that the dead man did not have a reputation as a drinker and that the level of alcohol in his blood did not exceed the legal limit. The jurors then completed questionnaires in which they evaluated a number of factors.

The consultants found statistically significant differences between the two groups in: (1) their perceptions of key arguments, (2) their evaluations of the plaintiff and defense attorneys, and (3) verdict decisions. Specifically, jurors in the inoculation group found the key defense arguments involving the consumption of alcohol to be less persuasive than did the jurors in the sponsorship group. Inoculation yielded both positive benefits to the plaintiff’s attorney and negative consequences to the defense attorney. The inoculation group viewed the plaintiffs’ attorney who inoculated the jury as more honest, organized, persuasive, poised and effective than the plaintiffs’ attorney who did not inoculate. Likewise, the inoculation group viewed the defense attorney as less honest, organized, clear, persuasive, and effective, and as more nervous than the sponsorship group viewed the defense attorney.

Inoculation also translated into benefits with respect to the verdict. The inoculation group had a higher desire for the plaintiff to win and a lower desire for the defendant to win. Fifty percent of the jurors in the inoculation group found for the plaintiff, while only forty-three percent of the jurors in the sponsorship group found for the plaintiff. Finally, fifty-nine percent of the jurors in the sponsorship group stated that it would have made a difference in their verdict if the plaintiffs’ attorney had mentioned the drinking before the defense attorney.

In summary, this empirical research confirms that jurors “reward attorneys for managing negative case facts.” First, jurors find the opponents’ arguments to be less persuasive. Second, jurors have higher opinions of attorneys who inoculate and lower opinions of their opponents. Third, jurors are more committed to the positions of the side employing the attorney who inoculates.

39 Id.
40 Id.
41 Id.
42 Id.
B. Williams, Bourgeois & Croyle – “Stealing Thunder” Studies

A series of studies involving college students provides further support for a strategy of inoculation. In one study, approximately 150 college students read or watched testimony from an actual civil case involving a suit by a man’s estate against a shipyard, in which it was claimed that the man’s exposure to asbestos in the shipyard caused his death. The plaintiff’s medical expert’s testimony concerning causation was based solely upon a review of medical records. There was impeachment evidence that the plaintiff’s expert had testified the previous week in a different case that it was not scientifically valid to determine causation solely based upon a review of medical records. One group of the students (the “no thunder” group) was not presented with this impeaching evidence. A second group of students (the “thunder” group) was presented with the impeaching evidence only during cross-examination by the defendant. A third group (the “stolen thunder” group) was presented with the inconsistency accompanied by an explanation during the direct examination of the expert.

The “stolen thunder” students ranked the expert as being substantially more prepared, convincing and trustworthy than the “thunder” students ranked the expert. Incredibly, however, the “stolen thunder” group awarded not only more plaintiffs’ verdicts than the “thunder” group, but more plaintiffs’ verdicts than the “no thunder” group.

In a similar study involving a criminal case, the “stolen thunder” group heard about the defendant’s prior criminal convictions from the defendant’s attorney first, the “thunder” group heard about the prior convictions only during the cross-examination of the defendant by the state, and the “no thunder” group did not hear about the convictions. The probability of a finding of guilt was greatest when the prosecution disclosed the prior convictions, next greatest when the defendant disclosed the convictions, and least likely when the students did not hear about the prior convictions.

45 Id. at 605-606.
46 Id. The results were: “No thunder” group - 58% for plaintiff; “Thunder” group - 43% for plaintiff; “Stolen thunder” group - 65% for plaintiff.
47 Id. at 601.
48 Id at 601-602.
In a *Texas Bar Journal* article in September of 2000, Klonoff and Colby specifically addressed the Rice-Leggett study and recent criticism concerning the lack of empirical support for their theory. A full ten years after the initial articulation of their theory, Klonoff and Colby still were unable to cite even one empirical study that confirms or supports their theory. They had invited empirical testing of their theory in the early 1990's, but they renewed no such invitation in their 2000 article. Lastly, Klonoff and Colby focused exclusively on the Rice-Leggett study in their article, and ignored completely the body of other empirical testing that confirms the efficacy of inoculation as a principle of persuasion.

Klonoff and Colby contended that the Rice-Leggett study was a flawed study involving “an easily toppled straw man.” They nevertheless admitted that they do not believe that Rice and Leggett “intentionally rigged” their study to achieve one outcome over the other. They further contended that there is a continuing “live debate” concerning the relative merits of the inoculation and sponsorship theories, and that recent criticism of their theory was motivated by a misunderstanding concerning important aspects of their theory. Finally, they pointed out that their theory does take into account the variety of situations in which advocates should volunteer harmful facts.

Klonoff and Colby focused exclusively on the Rice-Leggett study in their 2000 article, but that study is far from the only empirical study confirming the efficacy of inoculation as a theory of persuasion. More importantly, where is the empirical evidence in support of the sponsorship theory? We can only assume that, ten years after the fact, there still is none. If we indulge in Klonoff and Colby’s assumption that there is indeed a continuing “live debate” concerning the relative efficacy of the two theories, why is there still no empirical evidence in support of the sponsorship theory?

Klonoff and Colby enriched the debate with their thought-provoking theory of

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52 See Note 35, supra.
54 Id. at 570.
55 Id. at 569-70.
56 See Note 43, supra.
sponsorship. The issue, though, must be the extent to which the sponsorship theory stands up to the scrutiny of empirical testing. Klonoff and Colby, the creators of the theory, would have us believe that the jury is still out on the theory. All of the empirical evidence, however, indicates otherwise.

VI. STRATEGIES FOR DEALING WITH DAMAGING OR PREJUDICIAL EVIDENCE

A. Motions in Limine

The first line of defense when confronting bad facts is the filing of a motion in limine, seeking to exclude the facts from the trial. If the trial court judge denies the motion, has the lawyer in Texas state court who now desires to inoculate preserved error concerning the admission of the bad facts? Clearly not.

A ruling denying a motion in limine does not suffice to preserve error concerning the admission of evidence; there must be an objection when the evidence is offered at trial. The rationale for the rule that motions in limine do not preserve error is that the trial court judge may reconsider his original ruling after he hears the evidence at trial. Further, the opponent of the evidence must not only object when the evidence is first offered, but must continue to object every time the evidence is offered, or the initial objection will be considered waived on appeal unless a running objection was secured.

Likewise, a ruling granting a motion in limine does not preserve error. The party offering the evidence must approach the bench and ask for a ruling, formally offer the evidence, and obtain a ruling on the offer. The granting of a motion in limine does not, in and of itself, exclude the evidence. Further, the granting of a motion in limine will not preserve error if a party violates the court’s order; there must be an objection, or any error in the admission of the

57 A procedural device that allows a party to identify, before trial, certain evidentiary rulings that the court may be asked to make and to prevent the presentation of potentially prejudicial evidence in front of the jury before the judge rules on the admissibility of the evidence. See Hartford Acc. & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); Weidner v. Sanchez, 14 S.W.3d 353, 363 (Tex. App.—Houston[14th Dist.] 2000, no pet.).

58 Hartford Acc. & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963).

59 See Reveal v. West, 764 S.W.2d 8, 11 (Tex. App.—Houston[1st Dist.] 1988, no writ).


61 See Johnson v. Garza, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied).

62 Id.
evidence is waived.  

A trial court’s ruling on a motion in limine cannot be reversible error. The violation of an order granting a motion in limine can be reversible error if the harm caused by the violation is incurable.

B. Objections

The requirement that the opponent of the evidence must object in order to preserve error arises out of rule 103 of the Texas Rules of Evidence and rule 33.1 of the Texas Rules of Appellate Procedure. Rule 103 provides, in part: “Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.” Rule 33.1 provides, in part:

Preservation of Error: How Shown.

(A) In general. As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection or motion that:
   (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
   (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:
   (A) ruled on the request, objection, or motion, either expressly or implicitly; or
   (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

To preserve error, the objecting party must object each and every time that the inadmissible evidence is offered; otherwise, the objection may be waived. “Running

63 See Poole v. Ford Motor Co., 715 S.W.2d 629, 637 (Tex. 1986).
64 Hartford Acc. & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963).
66 Tex. R. Evid. 103(a)(1) (emphasis supplied).
67 Tex. R. App. P. 33.1(a) (emphasis supplied).
68 Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984).
objections” may preserve error, but they must be specific and unambiguous, and there is a continuing risk that the running objection will be waived as the evidence changes or as different witnesses testify during the trial.69

C. Pursuing an Adverse Ruling

When the jury hears inadmissible evidence, the objecting party must “pursue an adverse ruling.” This is a multi-step process that begins with making an objection. If the court overrules the objection, error is generally preserved without the necessity of requesting an instruction to the jury, moving to strike, or moving for a mistrial.70

If the court sustains the objection, on the other hand, the objecting party must then ask the court to instruct the jury to disregard the evidence.71 If the court instructs the jury as requested, the objecting party must then make a motion to strike.72 Finally, if the court grants the motion to strike, the objecting party must move for a mistrial to preserve error.73

D. Limiting Instructions

Rule 105 of the Texas Rules of Evidence provides:

(a) Limiting Instruction. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court’s action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

(b) Offering Evidence for Limited Purpose. When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its

71 See State Bar v. Evans, 774 S.W.2d 656, 658 (Tex. 1989).
72 There is some debate regarding whether a motion to strike must be made in addition to an objection, but it is safest to presume that both are necessary. Compare Tex. R.Evid. 103(a)(1) (referring to objection or a motion to strike) and Smith Motor Sales v. Texas Motor Vehicle Comm’n, 809 S.W.2d 268, 272 (Tex. App.–Austin 1991, writ denied) (objection or motion to strike sufficient) with Parallax Corp. v. City of El Paso, 910 S.W.2d 86, 90 (Tex. App.–El Paso 1995, write denied) (motion to strike necessary).
offer to the party against whom it is admissible.

If evidence is admissible against any party for any purpose and one party fails to request a limiting instruction, then the party resisting the introduction of the evidence waives its complaint regarding the evidence.\textsuperscript{74} Evidence admitted for a limited purpose without a request for a limiting instruction may be used for any purpose by the jury.\textsuperscript{75}

When a court admits evidence over a party’s objection, the party, if possible, should ask the court to limit the admissibility of the evidence by instructing the jury to consider it only for a specific purpose.\textsuperscript{76} Conversely, when a court rules that evidence is inadmissible, the offering party should consider offering the evidence again, with an accompanying limiting instruction.\textsuperscript{77}

E. The Inoculator’s Dilemma

How can the inoculating lawyer preemptively introduce bad facts and simultaneously satisfy the explicit requirements of rule 103 of the Texas Rules of Evidence and rule 33.1 of the Texas Rules of Appellate Procedure? Does it make any sense at all to require the inoculating lawyer to object to the very evidence that the lawyer first introduced in the trial for strategic purposes?

Rule 103 of the Texas Rules of Evidence is adopted verbatim from rule 103 of the Federal Rules of Evidence. Federal case law interpreting the federal rule is therefore instructive concerning the Texas rule. Effective December 1, 2000, rule 103 of the Federal Rules was amended to add: “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error on appeal.”\textsuperscript{78} Texas Rule 103, on the other hand, was amended, effective January 1, 1998, to provide, “When the court hears objections outside the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.”\textsuperscript{79} The distinction between the federal and Texas amendments to rule 103 is that the amended federal rule applies either to admitted or excluded evidence, whereas the amended Texas rule applies only to evidence that is admitted over objection.\textsuperscript{80}

\textsuperscript{74} See Horizon v., Auld, 34 S.W.3d 887, 906 (Tex. 2000); Larson v. Cactus Util. Co., 730 S.W.2d 640, 642 (Tex. 1987).
\textsuperscript{75} Horizon, 34 S.W.3d at 906.
\textsuperscript{76} See Tex. R. Evid. 105(a).
\textsuperscript{77} See Tex. R. Evid. 105(b).
\textsuperscript{78} Tex. R. Evid. 103(a).
\textsuperscript{79} Id.
\textsuperscript{80} See Texas Rules of Evidence Handbook, 80, n. 99 (4\textsuperscript{th} ed. 2001).
F. Split Within the Federal Circuits on Rule 103 Prior to Ohler

Federal rule 103, before its 2000 amendment, did not address the circumstances in which an objection raised in a motion in limine had to be renewed at trial in order to preserve the objection for appeal. Consequently, a split developed within the federal circuit courts. The most restrictive approach was adopted by the Fifth Circuit in *Collins v. Wayne*. In *Collins*, the Fifth Circuit refused to consider the plaintiffs’ claim that the trial court erred in denying a motion in limine concerning the cross-examination of plaintiffs’ expert concerning his fees for testimony because plaintiffs’ counsel failed to object to the cross-examination at trial and “only a proper objection at trial can preserve error for appellate review.” The Eighth and Eleventh Circuits generally followed the *Collins* rule, with some exceptions.

The Tenth Circuit adopted a three-pronged test to determine whether a motion in limine preserved an objection for appeal. In *United States v. Meija*, the court held that pretrial motions in limine preserve error on appeal, without renewal of objections at trial, when the issue: (a) is fairly presented to the trial court, (b) is the type of issue that can be finally decided in a pretrial hearing, and (c) is ruled upon without equivocation by the trial judge. The Third and Ninth Circuits adopted what may have been the most lenient standard of all, focusing upon whether the trial court had made “a definitive ruling” before trial.

A separate, but related issue that split the Circuits was whether a party’s introduction of evidence *waived* that party’s earlier objections to that evidence. A number of Circuits held that a party waives its objection to evidence by offering that evidence at trial. A number of other Circuits, including the Fifth Circuit, rejected the waiver rationale and held that a party’s introduction of evidence to which it had already objected did not constitute a waiver of the party’s right to appeal based upon the admission of the evidence.

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81 *Collins v. Wayne*, 621 F.2d 777 (5th Cir. 1980).
82 *Id.*, 621 F.2d at 784.
83 See *Northwestern Flyers, Inc. v. Olson Bros. Mfg. Co.*, 679 F. 2d 1264, 1275 n. 27 (8th Cir. 1982); *Sprynczynatyk v. Gen. Motors Corp.*, 771 F. 2d 1112, 1118 (8th Cir. 1985); *Guolah v. Ford Motor Co.*, 118 F. 3d 1478, 1483 (11th Cir. 1997); *Judd v. Rodman*, 105 F. 3d 1339, 1342 (11th Cir. 1997).
84 *United States v. Meija*, 995 F. 2d 982 (10th Cir. 1993).
85 *Id.* at 986. The Second Circuit followed the Tenth Circuit in adopting this three-pronged test. See *Rosenfeld v. Basquiat*, 78 F. 3d 84, 90-91 (2d Cir. 1996).
87 See, e.g., *Gill v. Thomas*, 83 F.3d 537 (1st Cir. 1996); *United States v. Gaitan-Acevedo*, 148 F.3d 577 (6th Cir. 1998); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991).
88 See, e.g., *United States v. Fisher*, 106 F. 3d 622, 629 (5th Cir. 1997); *Reyes v.*
G. Ohler v. United States

In a 5 to 4 opinion in Ohler v. United States, the U.S. Supreme Court resolved the split within the circuits when it held that a criminal defendant who preemptively introduces evidence of a prior conviction on direct examination may not challenge the admission of such evidence on appeal. The case arose out of the criminal conviction of Maria Ohler for importation of marijuana and possession of marijuana with intent to distribute. Before trial, the government filed motions in limine seeking to admit a prior felony conviction for metamphetamine. The trial court judge denied the government’s motion to admit the prior conviction as character evidence, but reserved ruling on whether the conviction could be used for conviction purposes. On the first day of trial, the trial court judge then ruled that if Ohler testified, evidence of her prior conviction would be admissible for impeachment purposes. Ohler then testified in her own defense, denying any knowledge of the marijuana, but admitting on direct examination that she had a prior conviction for metamphetamine.

On appeal, Ohler challenged the trial court’s limine ruling allowing the government to use her prior conviction for impeachment purposes. In a comparatively brief opinion authored by Justice Rehnquist, the Court held that Ohler waived her ability to challenge the admissibility of the evidence of her prior conviction when she preemptively introduced it, herself. The court began by noting that a party introducing evidence generally cannot complain on appeal that the evidence was erroneously admitted. Federal Rule of Evidence 103 does not create an exception to the general rule because “is silent with respect to the effect of introducing evidence on direct examination, and later assigning its admission as error on appeal.” It is not “unfair” to make the defendant forego the tactical advantage of preemptively introducing the conviction in order to appeal the admission of the conviction, because “both the government and the defendant in a criminal trial must make choices as the trial progresses,” in accordance with “the normal rules of trial.” Rehnquist also cited a prior opinion, Luce v. United States, as support for the Court’s holding. In Luce, the Court held that a criminal defendant who remained off of the stand could not appeal a limine ruling allowing the admission of prior convictions as impeachment evidence.

Justice Souter, in a dissenting opinion joined by Justices Stevens, Ginsburg and Breyer, distinguished Ohler’s situation from the situation in Luce because Ohler “testified, and there is no question that the in limine ruling controlled her counsel’s decision to inquire about the earlier

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Missouri Pac. R.R., 589 F. 2d 791 (5th Cir. 1979); Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999); Judd v. Rodman, 105 F. 3d 1339 (11th Cir. 1997).

89 Ohler v. United States, 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed.2d 826 (U.S. 2000).
90 Ohler, 120 S. Ct. at 1852.
91 Ohler, 120 S. Ct. at 1853.
92 Id.
93 Id., 120 S. Ct. at 1854-55.
conviction; defense lawyers do not set out to impeach their own witnesses, much less their clients.” Souter reasoned that the general rule that a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted only makes sense in two scenarios: 1) when a party freely chooses to admit evidence of a fact, and the opponent’s evidence of that same fact is later erroneously admitted, and 2) when the objecting party takes inconsistent positions, first seeking admission of the evidence, but later assigning error to the admission of the very same evidence at his opponent’s request. Neither of these scenarios justified application of the general rule to Ohler because her situation was one in which she “opposed admission of the evidence and introduced it herself only to mitigate its effect in the hands of her adversary.” Souter cited a number of treatises in support of an exception to the general rule, and noted that the analysis turns, not on which party first introduces the evidence, but on which party seeks introduction and which seeks exclusion. In forcing a defendant to testify without being able to preemptively introduce evidence of convictions, the majority’s opinion creates “an impression of current deceit by concealment ... very much at odds with any purpose behind Rule 609, being obviously antithetical to dispassionate factfinding in support of a sound conclusion.” Allowing the defendant to introduce the convictions on direct examination, on the other hand, would tend to “promote fairness of trial without depriving the Government of anything to which it is entitled.”

There has been a great deal of analysis of the Ohler opinion since it was handed down in 2000. The analysis of one commentator is typical:

95 *Ohler*, 120 S. Ct. at 1856.
96 *Id.*
97 *Id.*
98 *Id.* citing 1 J. Wigmore, *Evidence* § 18, p. 836 (P. Tillers rev. 1983) (“[A] party who has made an unsuccessful motion in limine to exclude evidence that he expects the opponent to offer may be able to first offer that same evidence without waiving his claim of error”); M. Graham, *Handbook on Federal Evidence* § 103.4, p. 17 (1981) (“[T]he party may ... himself bring out evidence ruled admissible over his objection to minimize its effect without it constituting a waiver of his objection”); 1 J. Strong, *McCormick on Evidence* § 55, p. 246 (“[W]hen [a party’s] objection is made and overruled, he is entitled to treat this ruling as the ‘law of the trial’ and to explain or rebut, if he can, the evidence admitted over his protest”); D. Louisell & C. Mueller, *Federal Evidence* § 11, p. 65 (1977) (“Having done his best by objecting, the adversary would be indeed ill treated if then he was held to have thrown it all away by doing his best to protect his position by offering evidence of his own.”).
99 *Id.* at 1857.
100 *Ohler*, 120 S. Ct. at 1857.
The court’s opinion in *Ohler* leaves little room for compromise on the impact of a party’s preemptive disclosure of harmful information. The court appears to express a hard-and-fast rule subject to no exceptions. When a party attempts to draw the sting during direct examination, the party waives the right to complain about the error.  The Supreme Court would presumably find waiver any time a party, whether a criminal defendant or civil litigant, complained on appeal about evidence that the appealing party had introduced at trial. Thus, it would not have mattered if Ohler had sought a side bar conference and had renewed her motion in limine just prior to introducing her prior conviction to remove any doubt that she was disclosing the conviction only because of the court’s ruling. It would not have changed the outcome if she had waited until the end of her direct examination before introducing the prior conviction, so that the trial court would have had all of her testimony before it ruled. And, it would not have changed the result in *Ohler* even if the prosecution had stipulated on the record that it unequivocally intended to inquire about the prior conviction during the cross-examination of Ohler. The *Ohler* decision appears to boil down to a simple mathematical equation: preemptive disclosure equals waiver.  

**H. Pretrial Ruling on Admissibility of Evidence**

In light of the *Ohler* opinion and the differences between federal and Texas state practice and procedure, what is best strategic approach in Texas state court to inoculating and maximizing preservation of error?  

State and federal courts in Texas do not even use the term “motion in limine” in the same way. Texas state courts make a distinction between “motions in limine” and “pretrial rulings on admissibility,” while federal courts tend to use the term “motion in limine” in a broader sense to refer to any motion to exclude evidence before it is offered.  

The filing of a motion in limine in Texas state court preserves no error, but a definitive “pretrial ruling on admissibility” may preserve error.  

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104 *Poole v. Ford Motor Co.*, 715 S.W.2d 629, 637 (Tex. 1986); *Hartford Acc. & Indem. Co. v. McCordell*, 369 S.W.2d 331, 335 (Tex. 1963).

state court is therefore well-advised to obtain a pretrial ruling on admissibility, as opposed to a
generic ruling on a motion in limine, in order to obtain a definitive ruling on the record from the
trial court. This is consistent with the January 1998 amendments to Texas rule 103, which
provide, “When the court hears objections outside the presence of the jury and rules that such
evidence be admitted, such objections shall be deemed to apply to such evidence when it is
admitted before the jury without the necessity of repeating those objections.”

Rulings on pretrial “gatekeeper hearings” on experts under Daubert have been held to be final and definitive
rulings that preserved objections to the experts’ testimony without the necessity of repeating the
objections at trial. Nevertheless, it is always safest to obtain clarification on the record that
the court’s ruling is definitive.

I. Error Preservation Problems

A pretrial ruling on admissibility in Texas state court addresses the issue of the motion in
limine’s failure to preserve error, but the issue of potential waiver -- the basis of the Ohler
decision -- remains. Specifically, regardless of whether the party objecting to the evidence
preserves its objection by obtaining a pretrial ruling on admissibility, does the party subsequently
waive the objection when it preemptively introduces the evidence?

One commentator on Ohler and inoculation suggests that a trial lawyer may address
weaknesses in voir dire and opening statement without waiving error. In Texas, however,
there is some ambiguous Texas Supreme Court authority to support an argument that discussing
unfavorable evidence in front of the jury, even if only in voir dire for purposes of testing the
jurors’ response to the evidence, may constitute a waiver of any right to appeal based upon the
evidence.

In Accord v. General Motors Corporation, a personal injury products case, the plaintiff filed a motion in limine seeking to prevent any of the defendants’ attorneys from mentioning the plaintiff’s refusal to accept a blood transfusion because of her religious beliefs. After the trial
court judge overruled the motion, the plaintiff’s attorney asked the jurors during voir dire
whether any of them would be potentially prejudiced by the evidence concerning the blood
transfusion. None of the defendants brought up the subject during argument and trial. The

App.--Houston[1st Dist.] 1996), aff’d, 972 S.W.2d 35 (1998); Huckaby v. A.G. Perry & Son,

106 Id.

Texarkana 2000, pet. denied).


110 Accord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984).

111 Id., 669 S.W.2d at 116.
Texas Supreme Court held that no error on the issue was preserved because the evidence was not “in fact asked and offered,” as a necessary prerequisite to an objection by the plaintiff.\(^\text{112}\)

The court appeared to be reasoning that the plaintiff failed to preserve error because she merely filed a motion in limine, and failed to object to any evidence at trial—which was an impossibility, given that the evidence was never introduced by the defendants. The court nevertheless used waiver-type language when it noted that, “it was [the plaintiff’s] lawyer who introduced the matter into trial during the voir dire examination by asking if any potential juror would thereby be prejudiced.”\(^\text{113}\) The court did not address the specific issue of whether or not the result might have been different if the defendants had in fact introduced the evidence concerning the transfusion, and whether the plaintiff attorney’s discussion of the issue during voir dire would have constituted a waiver in that situation, but the court’s language remains troubling for proponents of inoculation. Significantly, however, the Accord decision also appears to give the sponsors of bad evidence the power to limit the objecting party’s right to appeal based upon the bad evidence because it forecloses an appeal when the sponsoring party threatens to introduce the bad evidence, but later fails to introduce the evidence after the objecting party has inoculated on the evidence.

In Bay Area Healthcare v. McShane,\(^\text{114}\) the plaintiff sued, then later non-suited two doctors in a medical malpractice case. The trial court judge overruled the plaintiff’s motion in limine regarding evidence of superceded pleadings. The non-suited doctors testified at trial, over the plaintiff’s objection, that they had been sued. The Texas Supreme Court held that there was no error because the plaintiff’s attorney was the first to allude to the non-suited doctors’ status as parties “by telling the panel that a doctor’s conduct ‘could have been brought before this Court in this trial’ but ‘both sides have not done that at this trial.’”

What is the bottom line with respect to inoculation and waiver in Texas state court? According to one commentator:

As the result of the recent holding in Ohler, federal law and state law in Texas are at last in partial harmony, at least on this point: If you bring out bad evidence on direct examination, even if only to make the best of a bad situation, you cannot object on appeal. If you decide to bring up some unpleasant evidence yourself in an effort to remove its sting, you can forget about appealing on those grounds.\(^\text{115}\)

\(^{112}\) Id., citing Hartford Acc. & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963).

\(^{113}\) Id. See also Ex Parte Gill, 509 S.W.2d 357, 358 (Tex. Crim App. 1974) (criminal defendant’s testimony on direct examination concerning his prior criminal record after limine on issue was denied constituted a “waiver.”)

\(^{114}\) 239 S.W.2d 231 (Tex. 2007).

In addressing the critical choice between inoculating and preserving error, trial lawyers may simply have to be guided by the principle that “lawyers should make every effort to win at trial, and not on appeal,” and “begin from the premise that disclosure is the best approach.”\footnote{Perrin, “Pricking Boils, Preserving Error: On the Horns of a Dilemma after \textit{Ohler v. United States},” 34 U.C. Davis L. Rev. 615, 671 (2001).}

VII. CONCLUSION

The empirical research confirming the triumph of inoculation over sponsorship squares with the common wisdom and intuition. Credibility is key in prevailing in any jury trial. Anything that enhances credibility is helpful and anything that detracts from credibility is harmful. Jurors certainly understand that trial lawyers are advocates for the positions of their clients, but it is counter-intuitive to believe that jurors will not penalize one side for introducing only helpful evidence. It makes sense that if the jury has a basic minimum level of confidence that one side is not trying to hide the ball, the jury will be more disposed to viewing that party and that party’s contentions in a favorable light. Of course, there is a fine line between completing the picture in the interests of justice and apologizing or appearing defensive. Further, inoculation is not always the correct approach to every potential problem area in a case. But in cases involving material, harmful evidence, inoculation offers a tested, effective approach to dealing with that evidence.

The inoculating attorney has a number of strategies at his disposal to deal with damaging or prejudicial evidence. These include, among others, objections, motions in limine, motions for pretrial rulings on the admissibility of evidence, and requests for limiting instructions to the jury. 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.