

# Embracing “THE UGLY”

*HOW TO OVERCOME COMPARATIVE FAULT  
BY THE PLAINTIFF AND BY A SETTLING PARTY*

Francisco “Frank” Guerra, IV.

*Capital Partner*

Guerra LLP – Trial Attorneys



**GUERRA LLP**  
TRIAL ATTORNEYS

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EMBRACE AND PLAN FOR CONFIRMATION BIAS

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THE INOCULATION THEORY

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DEALING WITH A PLAINTIFF'S LACK OF  
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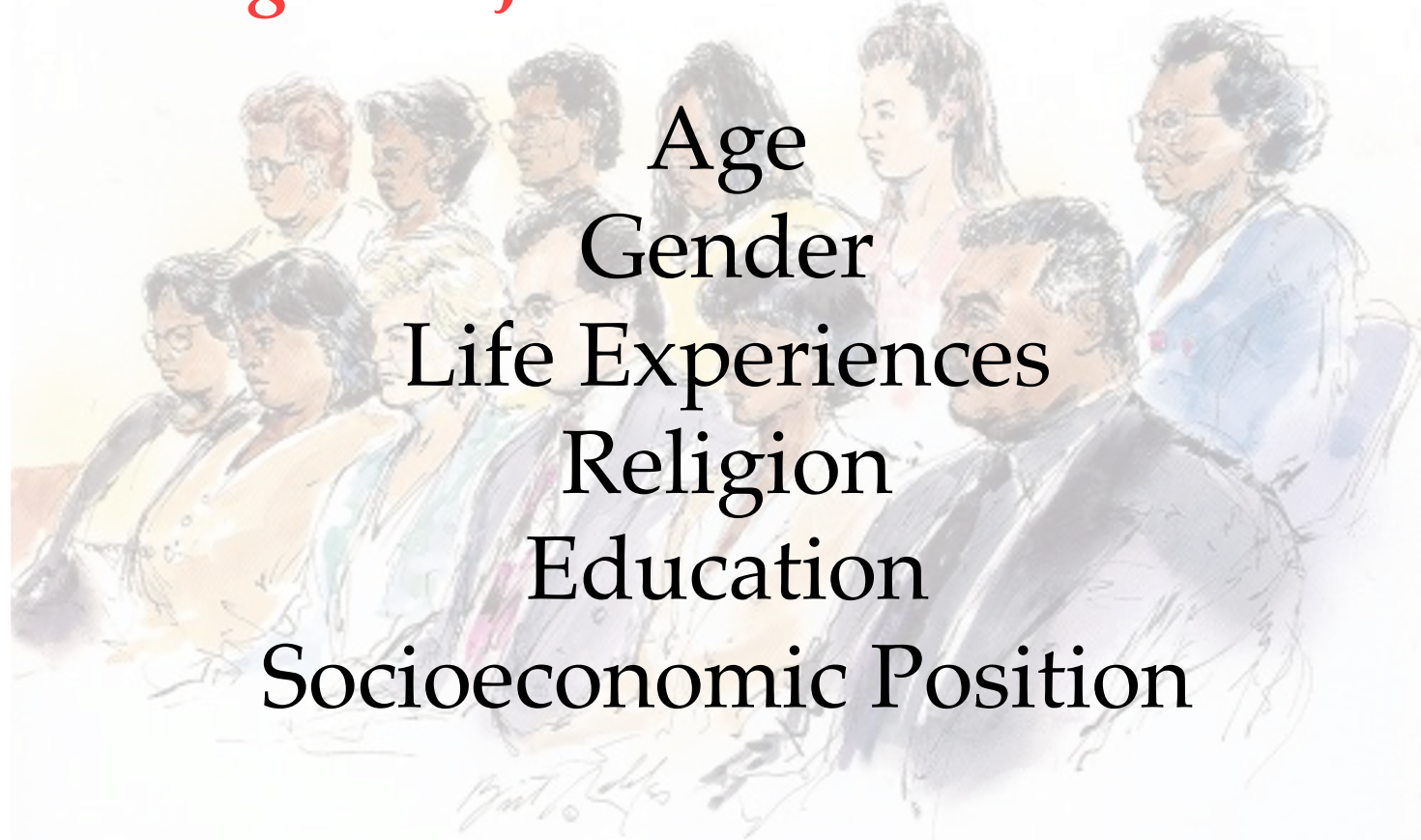
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DEALING WITH A SETTLING DEFENDANT/ EMPTY  
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Everything Starts with  
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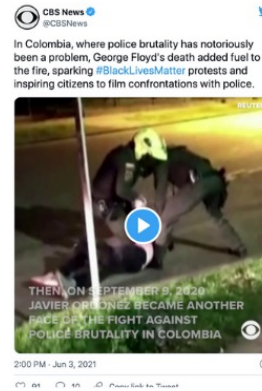


Age  
Gender  
Life Experiences  
Religion  
Education  
Socioeconomic Position

# SOCIAL MEDIA'S IMPACT ON THE JURY

# GEORGE FLOYD

## UNITED KINGDOM



## AUSTRALIA



***Knowing Your JURY*** –  
the Effect of  
Trump 1 and Trump 2



## SOCIAL MEDIA'S IMPACT ON THE JURY

WE HAVE BECOME A SOCIETY OF  
**DESENSITIZED** AND  
**SELF-CENTERED**  
PEOPLE

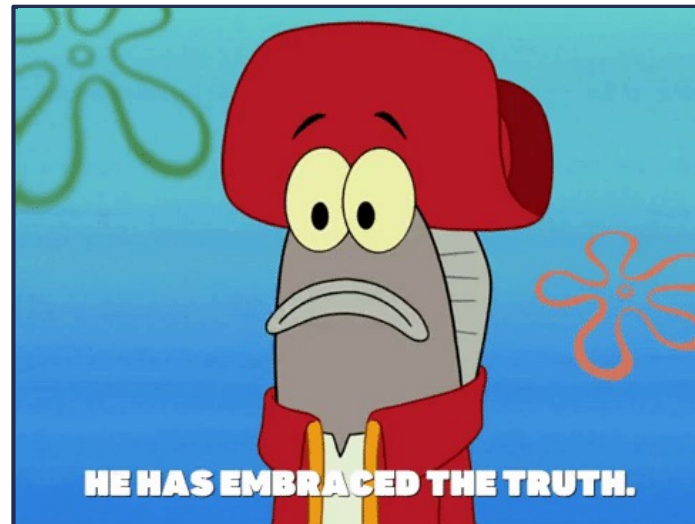


2

## Overcoming Desensitized Jurors - EMBRACING BAD EVIDENCE

So, how do you overcome the *attitudes of angry and desensitized jurors* in the context of comparative fault of the plaintiff and/or a settling defendant?

# YOU EMBRACE THE UGLY



# Big Picture Theme No. 1 - Credibility



**MAINTAINING  
CREDIBILITY ALWAYS  
WINS THE CASE!**

- Do not oversell or exaggerate your case
- Make promises you can keep
- **Innoculate the Jury first, often and last**

# Dealing with Bad Evidence

1

- **Easy cases** are usually resolved before reaching trial.
- **Difficult cases** with problematic facts and evidence are more likely to go to trial.
- **Unfavorable evidence** – such as the plaintiff's comparative fault or a settling defendant's role – must often be addressed before the jury.
- **Ignoring or hoping to avoid bad evidence** is not realistic or effective legal strategy.
- Most trial lawyers **emphasize their strengths and attack the opposition's weaknesses** – a good starting point.
- **Modern juries are often cynical and desensitized.**



# DEALING WITH BAD EVIDENCE

1

- **Success at trial** requires telling a story that is **both truthful and credible**.
- Part of that truthfulness includes **acknowledging bad facts** openly.
- Quoting Clarence Darrow:
  - *“Jurymen seldom convict a person they like or acquit one they dislike.”*
- **Credibility is paramount** – once lost, the trial is lost.
- To maintain credibility:
  - **Acknowledge the bad evidence** yourself before the defense does.
  - **Frame and control the message** around the bad facts.  
**Discuss the bad evidence first**, often, and last to take ownership and preserve trust with the jury.

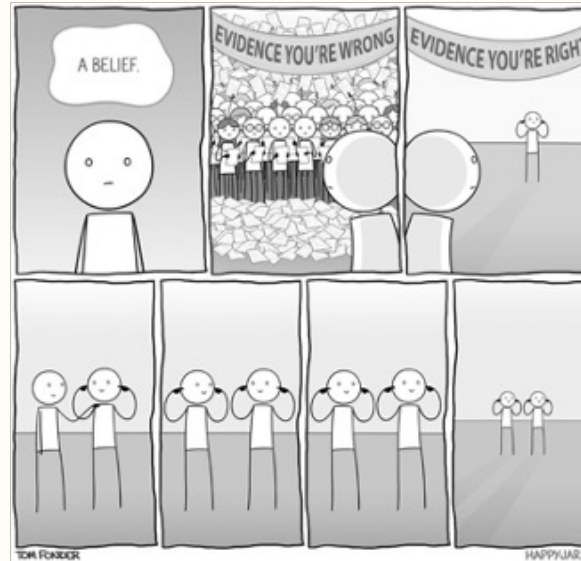
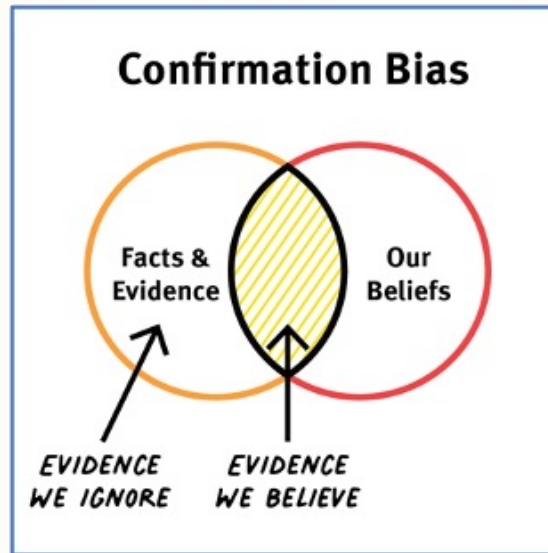


# 2

## BIG PICTURE THEME NO. 2 - PLAN FOR CONFIRMATION BIAS

This process is commonly referred to as “**confirmation bias**”.

Perceptions and associations that are hardwired in humans and based on personal experiences, preferences, and prejudices.



## 2

# TAKE ADVANTAGE OF CONFIRMATION BIAS

Credibly frame **WHAT the JURY will likely BELIEVE** is the scenario:

- ⇒ Jurors come up with a hypothesis early in the trial;
- ⇒ They immediately begin seeking out case information to prove their hypothesis;
- ⇒ They give preferential treatment to evidence and testimony supporting their existing belief, while ignoring, discounting, or downplaying information that does not support it;
- ⇒ They tend to have better recollection of evidence and testimony supporting the side they favor;
- ⇒ They entrench themselves deeply into their stance.

# 3

## Big Picture Theme No. 3 – **THE INNOCULATION THEORY**

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**Inoculation theory**, generally, is a persuasion technique where **exposing individuals to weakened versions** of a counter-argument **builds resistance** against stronger, later attacks.



### **This is accomplished by:**

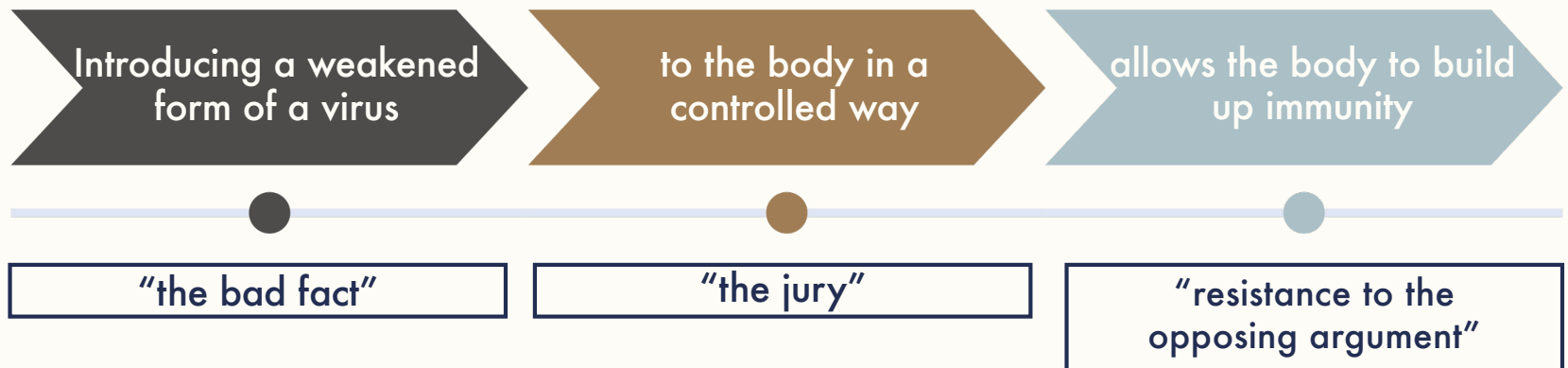
- Forewarnings and Preemptive Refutation
- Strengthening Credibility
- Choosing the Language
- Building Resistance



3

# THE INOCULATION THEORY

This approach is similar to how a medical vaccine works





Big Picture Theme No. 3 –  
Use *Primacy and Recency* to Establish  
*Credibility with Bad Evidence*

PRIMACY

RECENCY



**The state of being first**  
creates a strong,  
almost unshakeable  
impression.



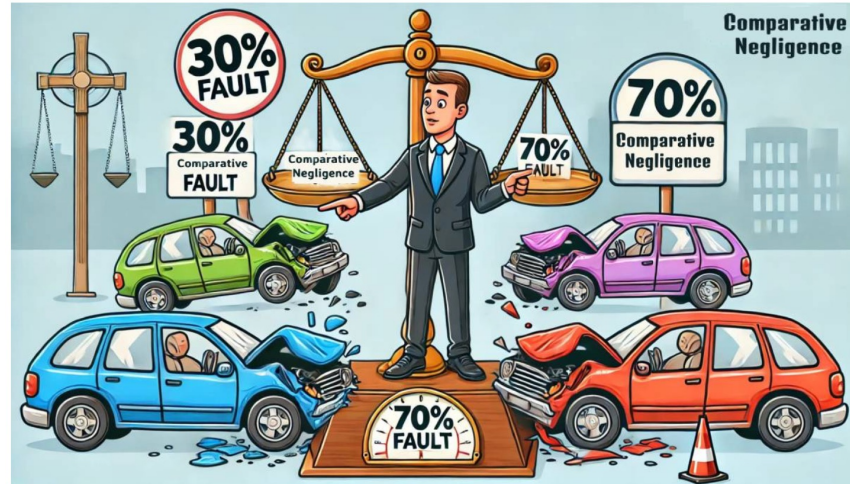
That things **most**  
**recently learned** are  
best remembered.

CREDIBILITY



Greatest Opportunity to Succeed for Your Client

When dealing with a **Plaintiff's comparative negligence**,  
*the Devil is in the DETAILS, DETAILS, DETAILS . . .*



2

## PREPARE DETAILED COMPARISON CHARTS AND USE THEM OFTEN

How do you ***favorably compare*** the Plaintiffs fault to the fault of other Parties?

TIME

NEGLIGENT  
ACTS

OPPORTUNITIES

TRAINING

When dealing with a Plaintiff's Comparative Negligence  
***KEEP THE DETAILS SIMPLE*** and ***REPEAT*** them ***OFTEN***.

(USE **TRUE OR FALSE METHOD** TO ESTABLISH CREDIBILITY)

**TRUE**

**FALSE**




Janine McCartney

On March 10, 2021, COG Operating LLC operated the subject site for ConocoPhillips Company? (McCartney Dep. 33:6-10; Rep. ¶15.)

6        **Q** And based on paragraph 5 of your report, you  
7        agree that on March 10, 2021, COG Operating, LLC,  
8        operated the subject site for ConocoPhillips company,  
9        correct?  
10       **A** Yeah, that is correct.

20

  
\_\_\_\_\_  
True                      False



Janine McCartney

## On March 10, 2021, ConocoPhillips Company owned the subject site?

(McCartney Dep. 33:20-24; Rep. ¶5.)

20           **Q (By Mr. Fassold) On March 10, 2021,**  
21           **ConocoPhillips Company owned the subject site?**  
22           A They were the operator --  
23                     MR. WILLIAMS: Objection, form.  
24           A -- and owner, correct.



True

False



Janine McCartney

On June 10, 2021, ConocoPhillips Company owned the Potato Baby 702H Well and Well pad? (McCartney Dep. 33:25-34:4; Supp. Rep. ¶6.)

25 Q (By Mr. Fassold) On June 10, 2021,

Page 34

1 ConocoPhillips Company owned the Potato Baby 702H well  
2 and well pad, true?

3 MR. WILLIAMS: Objection, form. Sorry.

4 A Correct.



True

False



Janine McCartney

## On June 10, 2021, Christian Perez worked for Beast Mode Services?

(McCartney Dep. 34:5-9; Supp. Rep. ¶9.)

5           **Q (By Mr. Fassold) On June 10, 2021, Christian**  
6           **Perez worked for Beast Mode Services, true?**  
7                   MR. WILLIAMS: Objection, form.  
8           **A Best of my knowledge with respect to the**  
9           **discovery evidence, the answer is "true."**

23



True

False



Janine McCartney

ConocoPhillips and COG had a responsibility to ensure that site safety inspections were performed regularly on June 10, 2021, at the subject site?

(McCartney Dep. 180:12-19;

Supp. Rep. ¶218.)

12 Q (By Mr. Fassold) – Cono-- ConocoPhillips and  
 13 COG had a responsibility to ensure that site safety  
 14 inspections were performed regularly on June 10, 2021, at  
 15 the subject site?  
 16 MR. WILLIAMS: Objection, form.  
 17 A Okay. The way it's written, I can't answer the  
 18 question. I just -- I gave you the -- the parameters by  
 19 which the reasonable standard is and...



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True

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False





Janine McCartney

On June 10, 2021, ConocoPhillips and COG did not have sufficient personnel to perform site safety services when RWDY was off site?

(McC 8 Q (By Mr. Fassold) So when RWDY -- if RWDY was  
9 not at the site, never came to the site, did -- did  
10 ConocoPhillips or COG have sufficient personnel to  
11 perform site safety services?  
12 MR. WILLIAMS: Objection, form.  
13 A I don't know. I don't know. I mean, the --  
14 Q (By Mr. Fassold) Well --  
15 A -- reason you hire RWDY is to provide those  
16 individual site safety services. They -- they certainly  
17 have a very high level of safety personnel and industrial  
18 hygienists in their offices. Whether they could have  
19 gotten one of -- one of the other personnel to come out  
20 and cover this site, I don't know.



True

False



Janine McCartney

On June 10, 2021, ConocoPhillips was responsible for complying with OSHA's standard of reasonable care?

(McCartney Dep. 211:10-212:4; Rep. ¶242;

10 Q (By Mr. Fassold) With regard to your  
11 supplemental report marked Discovery Exhibit 149, at  
12 paragraph 237, you stated "ConocoPhillips and COG were  
13 responsible for only complying with OSHA's standard of  
14 reasonable care on June 10th, 2021."

15 Did I read that correctly?

16 A Uh-huh. And the context within that is --

17 Q Ma'am -- ma'am, did I read that --

18 A -- Potato Baby.

19 Q -- correctly?

20 A Uh-huh. But you're taking it out of context.

21 But, yes, you le- -- read it correctly.

22 Q Okay. And is that still true today?

23 A It needs to have context for me to answer that

24 question. With respect to the Potato Baby State COM well

25 pad on 6/10/2021, ConocoPhillips and COG were responsible

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1 for only complying with OSHA's reasonable care standard.

2 Q Is -- is that -- is that your statement? And

3 are you standing by it?

4 A Yes.



True

False



Janine McCartney

# On June 10, 2021, ConocoPhillips had a duty to correct any violative condition?

(McCartney Dep. 212:22-213:10; Rep. ¶277.)

22 Q (By Mr. Fassold) All right. Discovery  
 23 Exhibit 148, which is your first report, at  
 24 paragraph 277, in the second sentence, you state  
 25 "ConocoPhillips has a responsibility to correct any

1 violative condition created by Mr. Perez and his  
 2 employer."  
 3 Is that what you said?  
 4 A Yes.  
 5 Q Is that still true today?  
 6 A When in imminent danger, yeah, that is true.  
 7 And that -- that goes to the reasonable standard. When  
 8 you're talking about the correcting employer and  
 9 ConocoPhillips as the controlling contractor, then it's  
 10 true within that context.

28



True

False

# DEALING WITH A PLAINTIFF'S *FAILURE TO MITIGATE*

4

Mitigation of damages is a legal principle requiring an injured party to take reasonable steps to minimize their losses after suffering harm from a wrongful act.

## **Factors to consider:**

- Reasonableness
- Foreseeability
- Good Faith
- Proportionality
- Availability of Reasonable Substitutes
- Plaintiff's Financial Abilities and Costs
- Timing
- Incapacitation



Inoculate the Jury by explaining the bad facts to prove that Plaintiff **DID NOT FAIL TO MITIGATE**

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4

### **Impact on Damages:**

*In order to inoculate the jury, you must affirmatively discuss and provide reasonable and believable evidence about why any of these mitigation efforts were not followed:*

- Plaintiff did not seek prompt medical attention after an injury **because...**
- Plaintiff did not follow medical advice and treatment plans diligently **because...**
- Plaintiff did not return to work when possible or seeking alternative employment if unable to return to the same job **because...**
- Plaintiff did not take steps to repair damages property promptly **because...**

5

## DEALING WITH A PLAINTIFF'S **LACK OF SEAT BELT USE**

*Formerly considered a potential failure to mitigate damages, this conduct is now recognized as pre-occurrence negligence that can directly impact the allocation of fault in personal injury cases.*

**There are two critical factors required to inoculate a jury on non-use of seatbelts:**

**Admit  
the  
non-use**

Hire a qualified expert  
(typically a  
biomechanical expert)  
that will explain and  
nullify causation of  
injuries based on non-  
use.

# 6

## DEALING WITH A SETTLING *DEFENDANT/EMPTY CHAIR*

This tactic is intended to shift blame and potentially reduce the amount of compensation the plaintiff can recover from the named defendant

- ⇒ Naming All Possible Liable Parties
- ⇒ Gather Strong Evidence
- ⇒ Visual Evidence
- ⇒ Expert Testimony
- ⇒ Focus on Defendant's Actions and Highlight Defendant's Negligence
- ⇒ Texas Civil Practice and Remedies Code §33.004

2

## PREPARE DETAILED COMPARISON CHARTS AND USE THEM OFTEN

How do you ***favorably compare*** the Defendant's fault to the fault of the settling Defendant?

TIME

NEGLIGENT  
ACTS

OPPORTUNITIES

TRAINING

“TELL THEM SOMETHING ABOUT ME THAT THEY DON'T KNOW ABOUT ME. . . ”



“TELL THEM SOMETHING ABOUT ME THAT YOU DON'T KNOW . . . ”

# CONCLUSION

7

The only way to ever succeed at trial is to not only tell a good story, but that story has to be truthful and credible.

In creating your client's story, you must maintain credibility at all costs.

*If you lose credibility, you lose the trial*

You must discuss the bad evidence **first**. You must discuss the bad evidence **often**. You must discuss the bad evidence **last**.

YOU MUST EMBRACE  
THE UGLY