Our Darkest Hours
FDCC Authors and Survivors

Twice a year FDCC members meet to hone our skills, share our experiences, and showcase our knowledge. As a group, and individually, we shine. It is easy to think that FDCC Members' gardens are always sunny, which makes us reluctant to share our defeats. And yet, this is where the lessons are; the ones we never forget and never repeat. This article attempts to gather those defeats and near misses, and share them, along with their hard-earned lessons.

Kile Turner's Very Bad Week

Nelson Mandela (who was also a lawyer) once said that "I either win, or I learn, but I don't lose." This mirrors my own personal belief that after a disappointment or setback, we should always ask "what can I learn from this?"

A few years ago I tried a commercial dispute where I was able to "learn" plenty. My client was a small consulting company headquartered in Spain that had done some work for a major U.S. bank. After a large investment in getting employees to the United States, the bank terminated the agreement. I represented the Spanish company in its claims for breach of contract against the bank. Although the jury ultimately came back with a verdict that was four times more than their pre-trial offer, the result was much less than what I had expected or hoped for. In many ways, this particular trial represents my "darkest hour" in the courtroom.

The trouble in the case began the Saturday evening before trial. That night, I got a call from my client, who owned the company, to tell me that some of the qualifications on her LinkedIn page were not completely accurate. I calmly and confidently assured her it was probably no big deal. She had already been deposed twice, and it was never brought up so opposing counsel most likely was not even aware of the issue. Of course, if asked she would have to respond honestly, which is the only way it could be handled, but I did not expect it to be an issue.

Needless to say, her cross-examination began with those inaccurate statements. Opposing counsel did an excellent job highlighting the untruthful qualifications without giving her the opportunity to fully explain. (She had completed a PH.D. program in math, but when her father became ill and required her care, she never turned in her dissertation). If I had known about this sooner, I could have been better prepared to handle the situation. Regardless, my decision to not address during direct was clearly a mistake by me as was my failure to more deeply inquire about my client.

Over the course of working the case up, I came to really like and respect my client. She was not only very intelligent, but had built a successful international consulting business. My personal admiration for my client blinded me from potential weaknesses and flaws that although minor, had a major impact on the case.

Lesson Learned: Find out everything, and I mean everything, about your client well before trial. The good, the bad, and the ugly. And then deal with it before opposing counsel does.

Another surprise struggle that occurred during the trial related to some of the judge's ruling. This case was tried in federal court, so the judge had more latitude to impact the case than in state court. He was very well regarded, a law school classmate of my trial partner, and knew the law. But early in the case, he became antagonistic to everything I tried to do, and sustained nearly every objection raised against me, regardless of whether it was valid or not. I had expected to be able to try my case, but once my opposing sensed he had an opening, he began objecting to everything. I recall one particular moment during direct examination of my client I began the question by asking, "What was discussed at this meeting (between the parties)?" The question drew a "leading" objection that was sustained! I am not sure how I could have asked a more open-ended question, but the constant objections, regardless of their validity, made it difficult for me to find my rhythm, which was further compounded by my client's efforts to testify over objections. (Another mistake I made in failing to fully prepare my client for the trial process).

On another occasion, while I was cross-examining their corporate representative, I scored a major point, which drew a frivolous objection from the other side. The judge overruled the objection, but then admonished me "not to smile like that" after getting a good response. This intervention by the judge greatly diluted the moment. I am not sure I was even smiling, although I am sure I was happy with the exchange. The judge sensed that and took the small victory away from me. But I should have been better equipped for the judge's attitude. Instead, I could feel myself grow frustrated.

Lesson Learned: One of the most important trial skills is the ability to anticipate and adapt to the situation. Quite frankly, I did not anticipate the judge taking such an active role in the case, nor did I think he would make as many of the adverse rulings that he did. I should have been better prepared for a hostile bench and a combative opposing counsel. Now, well before trial I try to have

a “Plan B” for every potential adverse ruling, and spend more time trying to spot where those vulnerabilities lie well before they occur.

A final lesson I learned during this trial was the importance of technology. During my opening, I struggled with getting my slides moving and being able to pull up the correct documents. We played the video deposition of a key witness from Spain, but, some of the snippets did not match up to what was disclosed. We had to start and stop several times, which was very unfortunate because the witness gave some very damning testimony for the opposition, but the message was diminished because the testimony did not flow.

The following spring, I attended FDCC’s FedTechU, and it completely upgraded my technology skills. Quite frankly, I believe if I had attended FedTech before the trial, I would have achieved a different result in the trial.

Lesson Learned: Master technology before you go into the courtroom. Technology is no replacement for advocacy skills, but it is very important in order to communicate the message effectively and credibly. Not every case and every venue needs a laser light show, but every juror deserves to have the information presented in a clear and understandable manner. And technology is a key component to accomplish effective communication. I also learned the importance of taking advantage of all the great programs offered by the FDCC and regret not doing it sooner!

Sean Griffin’s Darkest Hour (and Longest Month)

I was a young Trial Attorney at DOJ – about five years out of law school. Plaintiff, a construction company, was suing the US Government for about $7 million, alleging that the Army Corps of Engineers had issued defective specifications and ordered uncompensated schedule acceleration. The trial date was coming up in six months, so I had to travel weekly from Washington, DC to the Quad Cities in Illinois/Iowa for site inspections, 30 or so client interviews, about 40 depositions, etc. Did I mention that I was the only DOJ attorney on the case? Oh, and did I mention that we had a newborn at home?

Anyway, after six months or so of weeklong trips, I managed to cobble together an extremely clever litigation strategy. You see, the plaintiff’s claim was a “total cost claim,” which meant that

plaintiff had certified that it was *impossible* to separate the damages relating to one cause of action from another. These are the equivalent of going "all in." If plaintiff can prove every claim, they can usually win big on damages. However, if the defense can eliminate one claim, the plaintiff technically can't prove any of its damages with reasonable certainty, so it loses completely.

So, in an undeniably brilliant strategy, I moved for summary judgment on the weaker defective specifications claim, figuring that a win there would knock down plaintiff's house of cards. If I won, plaintiff would be left unable to prove its damages, and I would win my case entirely. Six months of 16-hour days would have paid off spectacularly.

Two weeks before trial was supposed to start, the judge granted my summary judgment motion. While I was patting myself on the back, the plaintiff moved to amend its complaint to substitute a brand-new differing site conditions claim for its defeated defective specifications claim. I objected on the ground of unfair surprise, pointing out that allowing the amendment would involve plaintiff to introduce unproduced documents and all-new witness testimony at trial. The judge conceded that granting the motion would prejudice me, but she said that I could "purge myself of prejudice" if she re-opened discovery. The judge explained that I could a few depositions while writing my pre-trial brief and preparing for the 20 or so trial witnesses and assembling the 400 or so exhibits.

"You have other attorneys helping you on this case, right?" she asked.

"No," I said.

"You have paralegals, though, don't you?" she asked.

"No," I said.

"Huh," she said. She then granted plaintiff's motion to amend and re-opened discovery. I moved to continue the trial date in light of the newly allowed amendment, and she denied that motion on the ground that a delay would prejudice the plaintiff.

I have had bad days in court since that ruling. I have lost cases since that ruling. But I don't know if I've had a darker day than when I got back to my office and contemplated the mountain of work facing me over the next two weeks, with a six-month old child at home. I just stared into the middle distance for a while.

Then I stopped feeling sorry for myself and got to work. What else was there to do?

Rarely in my career have I been more relieved than, after a solid month of 20-hour days, I finished my closing argument. The relief that I felt that day even exceeded my satisfaction a few weeks later, when I received the judge's opinion granting a complete defense verdict. Her opinion noted that I had "purged myself of prejudice."

Todd Raskin's Darkest Hour - Literally

I was defending a fourth amendment excessive force case on behalf of two police officers in the U.S. District Court of Ohio. They responded to a suspected burglary at 2:00a.m. The suspect was seen carrying multiple items from a home. He was detained and a struggle occurred causing the

officers to take him to the ground handcuff him. He claimed that one of the officers put his boot on the suspects back while the other officer put his gun to the suspects temple threatening to shoot him if he didn't confess to the burglary. The officers denied any attempt at a coerced confession or threatening the suspect with a gun.

The suspect was never charged as it was determined that he was on the property with permission. During discovery the Plaintiff disclosed an eyewitness who claimed that he was at the scene in his car and witnessed the officers conduct just as the Plaintiff claimed.

After deposing the witness, I was convinced he was untruthful, so we recreated the scene at 2:00 a.m. on a date where the weather conditions were the same. We utilized the same two officers and a third with the same physical characteristics as the Plaintiff. The video was placed in the street at the same location the eyewitness claimed to be when he witnessed the events. The video demonstrated that the eye witness couldn't see anything at all from his location in the street. My intention was to use the video in both cross of the alleged eyewitness as well as in close.

Unfortunately the court ruled the video inadmissible and prohibited it's use for any purpose, ruling that the aperture of the video camera was not the same as the human eye. Fortunately the courtroom was quite large so in both cross and close I used a construction tape measure which was several hundred feet and extended the full length of the courtroom and out into the hall to show the jury just how far away the alleged eyewitness was from the scene of the arrest to establish that his testimony was unreliable and should be rejected.

The Plaintiff also claimed he suffered from PTSD because the officer cocked his weapon while holding it to the Plaintiff's head in order to coerce a confession. With the assistance of the U.S. Marshall, we were permitted to bring the officers' gun into the courtroom….It was a Glock which was the standard issue to all officers on the department and that weapon has no hammer.

The jury returned a defense verdict after less than four hours deliberation. Notwithstanding the court's ruling on the evidentiary issue justice was served.

Practice Tip: The takeaway is whenever a case requires a nighttime recreation be sure to hire a night vision expert whose testimony can provide the evidentiary foundation for the admissibility of the recreation. In three subsequent cases I utilized Fawsi Bayan of SEA Ltd. He was well credentialed, easy to work with and an excellent witness.

A Collection of Horror Stories by Bob Massie

The critical witness dodges trial and goes in hospital to avoid testifying? 800k loss.

Judge orders no gaps in witnesses being presented or you rest, and my key witness's, an expert, son goes in hospital with an emergency and judge won't give me a continuance? Hung jury.

Client refuses to pay an additional 2500 on a potential 80k settlement so the judge rules against me on every objection and motion for a week straight? Just persevere and get defense verdict. With judge calling me crazy multiple times in front of jury.

Former girlfriend of a college buddy shows up (she deliberately hit me with her car in college) and gets picked for my jury? Solution? Go off record. Explain to judge reason she can't be on jury. Opposing lawyers laugh hysterically. Judge agrees. Strikes her for cause, with no motion on the record. But then on the record in front of potential jurors he asks if anyone else in the jury panel hit me with a car. $3 Mil in my favor.

First trial ever, first witness ever, I somehow manage to lose my notes/outline for cross-exam of significant witness in federal court. And no, they never left my possession. I discover they are missing as the witness is sworn in. Have to 1. – not pass out, 2. -pay attention to witness testimony, 3. -recreate outline from memory and 4. – not let supervising partner know I've screwed up. Went well. Witness flips and testifies for us. Partner never knows. And I don't pass out. Defense verdict.

Third trial ever. Federal court. I sit down at counsel table and hear fabric tearing. Caught my suit pants pocket on arm of chair and ripped the pants.

Find out evening before trial that my accident reconstructionist (I didn't hire him. Prior counsel did) was a state trooper and was fired as a trooper for potential theft of funds. Does plaintiff's counsel know I ask? Yep, his sister in law is the lawyer's secretary. Next morning opposing counsel entire office shows up to watch the bloodbath that is to be his cross. With client's consent I had released expert the night before and was not going to call him. I rest with no expert testimony, and no witness testimony at all, with judge laughing at plaintiff's counsel about his "swing and a miss." Apparently the judge knew about it too. Counsel asks for missing witness instruction. Judge denies because nobody ever mentioned the witness before the jury. Defense verdict.

Month long trial of bad brain injury case. Last demand is 25M. Jury deliberating and asks bailiff for a dictionary. Bailiff asks court reporter who says "why not?" so he gives them one. Judge hears about it a few minutes later and loses his mind. Takes dictionary from jury – who was looking up definition of probable cause. Not the best sign for defense. Judge asks either side if they have a motion for mistrial. Both refuse and decide to gamble. Defense verdict. Plaintiff raises the issue on appeal but it had been waived.

Dart Meadow's Brush with Plaintiff's Fame

In 1992, I tried a closed head injury brain damage case in Fulton County Georgia for Delta Airlines involving an overhead bin incident on a flight to Atlanta. Plaintiff Tim Pritchett was sitting in the bulkhead aisle when the flight attendant opened the overhead bin looking for a magazine. His briefcase fell out and hit him in the back of the head. He did not seek medical treatment until a couple of days later and had no visible sign of injury on the plane. Plaintiff presented 18 witnesses at trial and put up Pritchett last. Liability was pretty clear because Delta is common carrier which is held to a higher standard of care. Damages were hotly contested. Pritchett was either making an academy award winning fabricated presentation or truly was the eggshell plaintiff.

The most interesting part of the case is that Pritchett was a CBS records promoter who worked with country music stars. A few months before trial his lawyer took the evidentiary depositions in

Nashville of three country music stars whose music Pritchard promoted. They testified as "before and after witnesses" regarding how the incident dramatically altered his life. The first deposition was Ricky Skaggs at his office at Music Row. The second one was Tammy Wynette on her living room couch at her home. The final deposition was Charlie Daniels just before he went stage to perform at the Grand Ole Opry. When it was my turn to cross-examine Mr. Daniels, I said "I am Dart Meadows and I represent Delta Airlines". Charley Daniels sarcastically responded "I kinda figured that Dart".

I still have a CD with the three video depositions. The Jury awarded the Plaintiff $560,000.

Andy Downs Learns "New Math"

The darkest hour, or at least the one I'm willing to admit to, came in the trial of a business income dispute in federal court in Reno, Nevada back in 2008. The trial started a week after the collapse of Lehman Brothers, and the stock market, in September 2008 and my client's stock dropped like a stone throughout the trial. Fortunately, not because of me.

The case was fundamentally a dispute over how much was due under the Business Income coverage of a property insurance policy for the partial collapse of a factory roof during a blizzard. The main issue concerned how the contractual formula for calculating a business income loss was to be applied. We had already won (I thought) a partial summary judgment on that issue. Like many judicial attempts to interpret insurance policies the court's summary judgment ruling created its own new set of interpretative issues. Our forensic accountant had calculated the policyholder's loss as the accountant interpreted the court's prior ruling and that sum had been paid.

In response to a motion in limine, the court changed its formula the day before trial commenced. The upshot was our client owed an additional $4,031. This was in a case where the lowest settlement demand was $1.8 million and the policyholder counsel later asked the jury for $2.5 million. By the time our client's accountant had applied the court's new formula and calculated how more money was due, we were in mid-trial and could not get the newly undisputed amount paid before the case went to the jury. Our client's accountant testified to it and I conceded the $4,031 in closing. The jury returned a verdict for the policyholder in exactly that amount. What they didn't know was that made the policyholder the prevailing party for costs purposes and we ended up owing about $40,000 in costs. Still, that was a lot better than $1.8 million or $2.5 million.

By the way, the policyholder appealed the judgment (on the court's formula issue) to the Ninth Circuit, which affirmed the judgment about 20 months later.

The lesson learned is when something unexpected happens, deal with it – don't let it faze you. Trials have surprises, many of them coming from the bench.

Stephen Burchett's "Gotcha Moment" in Magoffin County, Kentucky

Many years ago in Magoffin Co. Kentucky, Steve Burchett of Jackson Kelly, was defending a routine automobile accident. The cornerstone of his defense was video surveillance of the Plaintiff climbing a steep ladder carrying heavy asphalt roofing shingles. The Plaintiff was also filmed

scampering over the roof setting and nailing panels of shingles. Plaintiff's counsel had not asked for the results any surveillance in discovery and Burchett was poised to completely surprise Plaintiff.

At trial, when confronted with the surveillance, the Plaintiff looked at the film closely, kept his composure completely and said, "Well, that's my first cousin. Most people say we look almost like twins. I had heard he was doing well at his new roofing job."

Lesson learned is sure to know the answer to any question before you ask it. Also, be able to adapt during the course of trial if something doesn't go your way.

Rick Ramsey Learns that Pigs Get Fat but Hogs Get Slaughtered

We learn more from our losses than our wins and this was a crisis that started and resolved in just 20 minutes.

It was a med mal trial involving the death of a young father of 2 kids. He came to the ER with complaints of a headache. He left the ER against medical advice, later died of a brain bleed and his Estate sued the ER doctors. The claim was that he really didn't leave AMA and they prematurely discharged him.

The defense was strong. The plaintiff was willing to settle for just $25,000. However, the carrier was interested in sending a message to the plaintiff's bar that it would not pay nuisance value claims. Recall, this is the death of a young man with two small children.

The trial went very well for the defense. While the jury was deliberating, we got a message. The jury was hopelessly deadlocked for one side at 5:1. The Judge asked if both parties would be willing to go with a jury of just 5 and we can agree to discharge the one hold out? My clients readily agreed. The Plaintiff's attorney was dejected and she agreed as well.

Five minutes later I was in the hallway at the water fountain when I looked up and I saw the one juror holdout as he left the building. A pit formed in the bottom of my stomach as I knew for sure he was "my" juror. I had gotten that feeling in jury selection. I just knew he was favorable for our defense.

Twenty minutes later the jury knocked on the door. They had a verdict. $6 million dollars.

The case was later reversed on appeal and settled for a fraction of that verdict---but still well more than $25,000 demand too.

I learned a valuable lesson: do not go with a jury of 5 ever again. If the jury is hung, take the mistrial!

My Partner's Awful, Horrible, Very Bad Day

Last month, my partner, a seasoned medical malpractice attorney, was defending a wrongful death case in Southern West Virginia. The decedent had presented to a local emergency room for care twice in as many days, both times complaining chest and arm pain. Clinically, the provider believed the presentation was more consistent with indigestion than any cardiac symptoms. No blood was drawn and he was released to go home, where he died the following day. He was survived by his wife and two children, the oldest of whom was a 20-year-old disabled son who was born when they were teenagers. It was a tough case; the client has begged the carrier to settle the case, even offering to contribute his own funds to resolve it. The carrier elected not to extend an offer but to instead proceed to trial based on its internal policy of trying professional liability cases where expert support existed for the defense.

The Plaintiff's case went well. Their experts were credible and prepared. They ended their case with testimony from the decedent's wife who told the jury that her hardest day was not the day she was diagnosed with brain cancer, and not the day of her surgery, but the day that she had to tell her disabled son that his beloved father was gone. He couldn't understand where his father had gone, so each night they would write notes to him, which they folded and placed into helium lanterns. On Friday nights, they gathered with friends to send the lights and notes up to his father. Social Media postings were replete with pictures of lanterns beneath the clear starry skies in the mountains of West Virginia. In truth, the decedent was not a perfect husband or father. He had a criminal record and had served time in jail, but the Court excluded all character evidence from trial.

The defense witnesses were only adequate, with the exception of the last witness – an expert who was outstanding. He was a 60-year-old Board Certified surgeon who served as Chair of the Cardio Thoracic Surgery Department at a well-known university. He had mastered the art of teaching complex matters in understandable terms. His direct exam was a triumph. His cross examination went something like this:

Q: Dr. Smith, did you serve as Faculty Chair of X University?

A: Yes I did.

Q. And you remain employed there now?

A. Yes, I do.

Q. Were you issued a private reprimand last year for practicing while under the influence of alcohol?

A. Um.

Q. And the same Dr. Smith whose license was suspended in March for failure to comply with the physician's assistance program?

Q. And the same Dr. Smith who was placed on probation and subsequently suspended from the University?

Q. And the same Dr. Smith who continued to appear on campus and attempt to teach your classes, despite your suspension?

Q. And the same Dr. Smith whose license to practice medicine was revoked three months ago?

Q: You are not a doctor, are you? You haven't been a doctor since June 2023.

A: I can explain.

……

Plaintiff's counsel must have issued engraved invitations for his cross examination, as attorneys from all over the state were present in the courtroom to watch the witness, and therefore the case, unravel. The trial day concluded with this testimony and the defense had no more witnesses to present.

Our litigation team met immediately to brainstorm options while the trial team prepared for closing and instructions. We drafted a motion to continue; a motion for a mistrial and searched for last-minute alternative witnesses, calling in every favor that we could possibly muster from local cardiologists. The following morning, the Court denied all of our motions and struck the expert witness. The carrier extended its full policy limit as an offer, and subsequently offered an amount in excess of the policy limits. Plaintiff's counsel actually laughed as he rejected the offers.

In closing, my partner began by apologizing to the jury and telling them that no one was more surprised by what unfolded that he and our client were. He went on to explain that neither our firm nor our client would ever mislead the jury or the court or waste their time with a witness who lacked credentials. He said that Dr. X, the witness was clearly very ill and must be suffering in ways that we could not imagine. He then went on to deliver the remainder of his closing.

The jury deliberated for an hour and returned a plaintiff's verdict of approximately $600,000, with a 20% reduction for the fault of a non-party. Never in the history of WV trials has a team been happier to receive a $600,000 verdict. The case was promptly settled and dismissed before a judgment order was entered.

Lessons learned:

1. Re-vet your witnesses before trial. The team had vetted him extensively before retaining him, but not since. We now re-vet our witnesses before trial.
2. Submit FOIA requests to licensing boards for your own witnesses. Do not rely on licensing statuses that you obtain from the witness or the state's online portal.

3. Include morality and adverse incidents clauses in retention agreements with experts. This would not have deterred the physician, who lied repeatedly under oath, but it would have at least indicated more due diligence on our part.
4. Credibility is everything. My partner is a quiet, deliberate man who is consummately prepared. I believe that the Court and jury knew this from the 9 prior days in trial and therefore did not punish him or the client for the expert's issue.
5. Keep trying your case. My partner could have given up, thrown a fit, or hid under the covers, but he kept trying his case, quietly, deliberately and with the steady composure that he had shown for the past two weeks. He authentically told the jury the truth.