

Eastern District of Texas Bench Bar 2021

The Hindsight Track

October 14, 2021

9:30 AM CT

[45 minutes]

Brochure Description

The Hindsight Track – What seasoned lawyers will share with young lawyers and old alike about career missteps and lucky breaks.

Panelists:

Doug Cawley [4]

Sam Baxter [0]

Gil Gillam [4]

Andy Tindel [5]

Tim Durst [4]

Ruffin Cordell [4]

Moderator: Danielle Williams

1. [1 min] INTRODUCTIONS [DW – My plan is to only say your names]
2. [4 min] PLEADINGS
  - a. [DW – LET’S BEGIN WHERE WE’RE USED TO BEGINNING, WITH THE PLEADINGS. ANDY – KICK US OFF WITH YOUR BEST PLEADINGS STORY]
  - b. ANDY – I have story about an amended pleading that Judge Lynn Hughes made us file in a securities fraud case that turned out to be a lucky break.
  - ~~c. ANDY I have a story about a pleading a lawyer filed on a Sunday afternoon with Judge Steger – lesson is that a pleadings can be filed directly with the judge, not just the clerk’s office.~~
  - d. RUFFIN – Don’t forget your training - As a young lawyer, I filed a lawsuit in federal court in Virginia. My opponents had been accustomed to state court practice and had answered with a demurrer. I had just taken the bar and knew that there was no such pleading in federal court. I reasoned that 1) they had answered, and 2) the demurrer was ineffective to deny the allegations of the complaint, so I moved for judgment on the pleadings. The judge agreed and we had a plaintiff’s judgment in the first six weeks of the case.

3. [4 min] DISCOVERY

- a. [DW – NEXT PHASE IS DISCOVERY, TIM KICK US OFF HERE]
- b. ~~ANDY I have several funny deposition stories – most involve what NOT to ask a witness – that turned up some unexpected helpful evidence.~~
- c. TIM - taking aggressive positions in discovery that backfire.
- d. ANDY I have a story about a lucky break that happened when I decided to sit down and plow through a mountain of documents instead of having someone else do it.
- e. RUFFIN: Always be in trial – We are all so accustomed to sitting through long, seemingly endless depositions but we sometimes forget that you are actually in “trial.” Three minutes of testimony can sink the entire case. I had a case in Judge Gilstrap’s court a few years ago where the CEO of the plaintiff clearly was irritated by having to sit for deposition. He decided to be difficult in response to really basic questions like “where do you live” and “where do you work.” We showed that testimony to the jury, and that’s pretty much where the case ended for them.

4. [8 min] PRE-TRIAL

- a. [DW – EVERYONE HAS A GREAT TRIAL STORY, AND WE’LL GET TO THOSE; BUT WHAT’S YOUR BEST PRE-TRIAL STORY]
- b. **Doug - How to be a lawyer that never lost a jury trial.** [Pre-trial negotiations; 4 minutes.] A senior lawyer advises a junior adversary to settle, because the senior has never lost a jury trial. Trial ensues anyway, and the junior wins a jury verdict. A few years later, another lawyer tells junior he just settled a case with senior, because “he’s never lost a jury trial.”
- c. GIL - Get your exhibits in order and make sure the courtroom will accommodate them. I tried a case in Tyler years ago and we had invested a large sum on a life size model of a tire conveyor system. When the company brought it to court in advance of trial, it would not fit through the doors. They had to take the whole thing apart and reconstruct it in the courtroom. Judge Willliam Wayne Justice was not pleased.
  - i. Gil - If your witnesses have not been in the courtroom before, take them there in advance of trial. Walk around. Sit in the witness box. Sit in the jury box. Understand sight lines.
  - ii. If your witness is going to have to get out of the box and demonstrate something:
  - iii. Let him or her practice it
  - iv. Know what the judge will allow and what he won’t

- d. **Doug - The power of a single word.** [Trial prep; 4 minutes] In an early version of a mock jury trial, we pull out all the stops: testimony by the client; depo testimony from our adversary; argument; jury questionnaires; the whole nine yards over two days. At the dramatic climax, a single word makes it all a waste of time.
- ~~e. **ANDY Pre-trial** - I have some anecdotes I can tell about some pretrial procedure pitfalls - i.e. the final pretrial order serves as the pleadings on which the case will be tried, thinking that a denied motion in limine will preserve error, etc.~~
- f. Ruffin Pre-trial: Try the case to your mom first – Both plaintiffs and defendants take too many claims and defenses to trial. I always imagine my mother and her friends as my prototypical jurors and through that lens, you can easily see when you are carrying too many issues. I had a recent case in another state where the judge gave the plaintiff three chances to cut down their claims for trial. The plaintiff refused, and I then found myself holding a summary judgment order.

5. [24 min] TRIAL

- a. [DW – NO SURPRISE THIS CREW HAS A LOT OF TRIAL STORIES; LET’S START WITH \_\_\_\_\_]
- b. Tim - Learning the hard way about narrowing claims for trial.
- c. GIL Keep your opponent awake—I can explain
- d. **ANDY Trial** – I have a Sam Baxter story (back when he was a state court judge) I can tell that illustrates the pitfalls of violating a motion in limine.
- e. **Doug - The young lawyer’s first examination.** [Direct examination skills; 3 minutes.] Running out of time in a trial in the Eastern District, a young lawyer goes to the podium to conduct his first examination in court. As the judge is seated, a senior lawyer puts his hand on the young lawyer’s shoulder and whispers in his ear, “if you go longer than fifteen minutes, you’re fired.”
- f. Tim overly hostile cross-examination at trial;
- g. Ruffin - Trial: Plan for cultural differences – Sam and I had a case years ago before Judge Folsom where I questioned a senior executive from Japan. I was merely trying to get him to authenticate a figure that I wanted to use with the jury. He refused, so I asked him to at least admit that the engineer who created the diagram was telling the truth. At that point he explained that in his company, there were two truths – inside truth within the company and then outside truth for the rest of us. Needless to say, we spent a fair amount of time showing that to the jury.
- h. Tim - lucky break, opposing counsel’s failure to close on all issues.
- i. Andy – I have a Judge Steger story about the need to make sure a courtroom demonstration will work as planned before you try it in front of the jury.
- j. **Doug - Cross examination of an FBI agent.** [Cross examination skills; 3 minutes.] Early in my career I was appointed to represent an indigent defendant. We went to trial on a charge of escape from a Federal facility. I’m called on to

cross-examine an FBI agent. I'm the only lawyer for the defense, so I carefully prep the defendant about what issues to listen for, and to take good notes since I won't be able to take notes during the cross. When I sit down the prosecution has re-direct, so I'm listening intently to that. My client has an urgent message, and whispers in my ear, "Douglas, you've got the skinniest legs I believe I've ever seen."

- k. GIL Know the judge's rules
  - i. Do you have to stand at the podium or are you free to move around
  - ii. How does the judge conduct voir dire? Blind strikes or ping pong approach?

~~Tim - Learning the hard way about narrowing claims for trial.~~

~~Tim controlling the wild expert witness~~

~~Ruffin Trial: Come ready to listen and adapt - I had a case in Maryland where a senior executive took the stand and described his background on direct. It was a throw away bit of testimony, but I had represented a company that he claimed to have worked for and knew that he was inflating his resume. It was my first point on cross and I exposed him. He immediately shut down and the judge actually found him to be a liar on the points that actually mattered.~~

- 6. [5 min] POST-TRIAL
  - a. GIL - Congratulate your opponent—I can explain
  - b. **ANDY** – I have a story about a case I argued before the Fifth Circuit I can tell on myself regarding use of humor that can backfire and another time where use of humor worked in an appellate argument.
- 7. THANK THE PANEL