


# FDCC'S VISIBILITY COMMITTEE


INCREASING AND ENHANCING FDCC'S VISIBILITY AND NAME RECOGNITION  
WITHIN THE BUSINESS AND INSURANCE COMMUNITIES.



VERY FEW  
LAWYERS HAVE  
WHAT IT TAKES  
TO BECOME AN  
FDCC LAWYER.

(EXACTLY HOW WE WANT IT TO BE.)

**Peer selected. Rigorously vetted. Unequaled experience, expertise, and professionalism.** For 75 years, the hand-picked members of the Federation of Defense & Corporate Counsel have been national leaders in the courthouse and in-house. Defense Lawyers and Litigation Managers -- the elite group that drives the agenda and educates the defense community. [www.thefederation.org](http://www.thefederation.org)



**FDCC**  
DEFENSE LAWYERS. DEFENSE LEADERS.

The Federation of Defense & Corporate Counsel is a 1000-member peer-selected group of some of the nation's top defense-oriented trial lawyers and in-house insurance counsel. They have possibly the industry's most rigorous vetting process - before being accepted into the organization, induction committees send dozens, sometimes hundreds of communications to clients, judges, opposing counsel, and other lawyers to verify a nominee's technical skill, personality, and integrity.

Due to the length of the name, they refer to the organization as "FDCC" or "The Federation." The tag line was "Knowledge. Justice. Fellowship." and the website descriptor was the somewhat vague "An organization of recognized leaders in the legal community dedicated to representation of insurers and corporations."

Truly, they are outstanding trial lawyers, and FDCC has developed since 1936 as a remarkably collegial and family-oriented organization. But these types of honorary peer-selected groups have some significant marketing challenges, including the recent glut of newly created "honorary" associations. Some are quite credible, but many other look-alike groups and vanity publications have sprung up simply to sell costly ego-related advertising to lawyers.

Many, if not most clients and prospects often can't tell the difference, so it's incumbent on us as marketers to inform legal-services purchasers that selection for FDCC membership is among the highest honors a defense litigator can achieve. If a lawyer has been admitted, they've already been vetted well beyond any single prospect's ability to do so - trust the FDCC process.



## LOGO AND IDENTITY:

In *Positioning: The Battle for Your Mind*, Reis and Trout wrote “To be well-known, you’ve got to avoid using initials.” Initial-based names/logos like “FDCC” are not memorable. Exacerbating that problem is that other organizations in some way similar or analogous to FDCC include e.g. IADC, LCA, DRI, PLAC, ALFA, and USLAW. It’s an alphabet soup of trade and honorary associations of defense lawyers.

Further, while loosely descriptive, “The Federation of Defense & Corporate Counsel” is too long and does not adequately convey the organization’s quality and leadership, especially when compared to the names of its marketing-driven “competitors” like *Best Lawyers* or *Super Lawyers*. There’s little risk of confusion or misunderstanding when your very name declares your members to be “Super.” The FDCC wasn’t created 75 years ago as a marketing-driven organization; so “Federation” made sense. Today, the name doesn’t help explain the high admission standards.

We felt that the previous logo did not adequately convey FDCC’s quality or leadership. The decision was made to keep “FDCC” and the brand identity they’d built, but we recommended linking it to a more-descriptive slogan/tag line, which would showcase FDCC’s leadership within the defense bar, as well as the inclusive membership of litigators and trial lawyers, risk managers, litigation managers, and other top-quality insurance professionals. Many options were considered, eventually settling on the simple and alliterative “Defense Lawyers. Defense Leaders.” The tag line is designed to be connected to the new logo in all iterations where it is large enough to be legible.

The laurel wreath mark connotes the highest achievement, an honor bestowed upon those who qualify. The courthouse/columns within the wreath show that this is a litigation-oriented organization, but is simple enough to not be trite or clichéd. It further complements the imagery used in the broader advertising and branding campaign. The gold color and 3D design, while slightly harder to use, also connotes a gold medal or other prestigious award.

We wanted to build the FDCC’s brand and prestige, to show that it is a significant honor to be invited, and enhance the credibility of the membership.



## WHAT ARE WE SAYING TO THEM?

1. FDCC is a **peer-selected, rigorously vetted** group of **the nation's best**:
  - (a) defense-oriented **trial lawyers**; and
  - (b) **in-house lawyers and key decision makers** at prominent companies and insurers who manage their company's litigation
2. **You can trust FDCC lawyers because of the strict admission standards.** Our lawyers have been rigorously screened and vetted for their experience, expertise, and knowledge.
3. **Corporate FDCC members are among the leaders in the in-house legal community.** They are thought leaders who run an efficient legal department, and manage their companies' litigation effectively.

## HOW ARE WE TALKING TO THEM?

The headlines and visuals that form the platform for the branding campaign are designed to show that it is an honor to have been selected to be a member. The headlines (e.g. "Very few lawyers can become FDCC members." or "It's hard to become an FDCC member.") tell FDCC's story, that it is an elite organization of members of the defense community. Simultaneously, the parenthetical subheads take the edge off of the self-congratulatory headlines with a slight wink (e.g. "Just the way we like it." or "Sounds good to us.")

We worked very closely with Visibility Committee chairman Howard Merten, a top trial lawyer at Rhode Island's Partridge, Snow & Hahn. In the marketing materials, we wanted to do more than simply claim high-level expertise, we wanted to *prove* it — to show FDCC's defense and industry-based thought leadership. The best evidence of that expertise is the significant educational material the members produce, in the high-quality substantive whitepapers, articles, and conference handouts. Therefore we designed a campaign that was both image-oriented and content-based. One critical component of linking the substance of the FDCC with its new branding image is our efforts directed to the Corporate Counsel Symposium, discussed in more detail below.

We allocated 1/3 of the budget on print and online advertising. We selected two industry-specific publications that permitted a combination of brand-building advertising as well as education — *Claims*

magazine, with its associated insurance-industry website, PropertyCasualty360.com (PC360), and *Metropolitan Corporate Counsel* (MCC).

In MCC, we selected full-page advertisements in which our branding ads occupy 1/4 page, with an FDCC member-written article wrapped around it. The rich blue ads attract sufficient attention at that size, and the 3/4-page articles highlights that the author is a member of the FDCC and include headshots and biographical information about each FDCC member-author.

Further, we bought enough MCC advertising that we were able to negotiate preferential treatment for special value-added extras, like lengthy interviews of FDCC members and leaders.

In PC360, we bought three months of a special editorial section created just for FDCC. It is shown as a branded logo link on the PC360 home page and also every internal page throughout the entire site. Clicking on that link sends visitors to an FDCC-specific page that shows five separate FDCC banner ads, plus a collection of our member articles, and other high-level articles written by the *Claims* editorial staff. The banner ads show the complete FDCC ad campaign, including an ad for the upcoming Corporate Counsel Symposium.

The links display articles on the FDCC website, enhancing our search-engine optimization (SEO), and allow repurposing of existing FDCC content.

# The Metropolitan Corporate Counsel

www.metrocorpccounsel.com

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## Another Step Forward: District Court Affirms Seminal Decision Authorizing Computer-Assisted Review Of ESI

William E. Vita

FEDERATION OF DEFENSE AND CORPORATE COUNSEL (FDCC)

On April 26, 2012, Judge Andrew Carter (S.D.N.Y.) upheld the groundbreaking decision of Magistrate Judge Andrew Peck in *Da Silva Moore v. Publicis Groupe*, No. 11-cv-1279 (A.L.C.), 2012 WL 1446534 (S.D.N.Y. April 26, 2012) (Carter, J.). That decision had approved, for the first time, the use of predictive coding software to review and produce ESI. *Da Silva Moore v. Publicis Groupe*, No. 11-cv-1279 (A.L.C.) (AJP), 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012) (Peck, M.J.). The affirmation provides further judicial acceptance of computer-assisted review as an alternative to costly and error-ridden linear human review of large volumes of ESI. This article briefly discusses Judge Carter's affirmation, the import of judicial

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acceptance of predictive coding for corporate counsel, and the future fate of predictive coding.

### Judge Carter's Decision

Judge Carter reviewed Judge Peck's decision under Fed. R. Civ. P. 72(a)'s deferential standard for discovery orders. He held that Judge Peck's allowance of "predictive coding" was within the reasonable exercise of the court's discretion. "[T]he Court adopts Judge Peck's rulings because they are well reasoned and they consider the potential advantages and pitfalls of the predictive coding software." *Da Silva Moore*, 2012 WL 1446534 at \*2 (Carter, J.).

Judge Carter thoroughly reviewed the ESI Protocol approved by Judge Peck. *Id.* at \*2. He referenced the protocol's protections of plaintiff, including standards for measuring reliability, quality control and the opportunity for plaintiff to challenge the end results. *Id.* He relied heavily upon the transparency of, and plaintiff's counsel's active participation in, the process employed by defendant. *Id.* Plaintiff's counsel had input into the selection of key words used to generate the "seed sets" of documents reviewed by defendant to "train" the software, access to the documents themselves, and defendant's coding of them. Finally, plaintiff could dispute defendant's coding decisions. 2012 WL 607412 at \*5 (Peck, M.J.).

Judge Carter also agreed with Judge Peck's assessment of the accuracy of human review versus predictive coding: "[i]t is difficult to ascertain that the predictive software is less reliable than the traditional keyword search." Compare *Id.* at \*9 with 2012 WL 1446534 at \*3 (Carter, J.). Judge Carter offered this practical observation:

There simply is no review tool that

guarantees perfection. The parties and Judge Peck have acknowledged that there are risks inherent in any method of reviewing electronic documents. Manual review with keyword searches is costly, though appropriate in certain situations. However, even if all parties here were willing to entertain the notion of manually reviewing the documents, such review is prone to human error and marred with inconsistencies from the various attorneys' determination of whether a document is responsive. *Id.*

### The Import Of Judicial Acceptance Of Predictive Coding

Corporate counsel see judicial acceptance of predictive coding as an important step in battling the ever-increasing costs of e-discovery, costs that threaten the viability of the present civil justice system. Tim Pratt, General Counsel of Boston Scientific and Secretary-Treasurer of the Federation of Defense & Corporate Counsel, commented on the decision:

Judge Carter's opinion accomplishes something we all should want – a better, quicker, cheaper way to get to the truly relevant documents in litigation. The first rule in the Federal Rules of Civil Procedure lays out the standard. The rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding. With the endless proliferation of electronically stored information within companies, there should be general alignment on the importance of coming up with a reliable method of identifying the documents that count. Predictive coding is one good way to do that. There will likely be others.

Boston Scientific has used predictive coding and seen demonstrable reductions in e-discovery costs.

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These thoughts were echoed by Marc Polk, Associate General Counsel/Litigation for Covidien, who noted that "[i]n the right context, predictive coding can be a valuable tool to manage costs and advance what should be the goal of everyone involved – identifying and obtaining information that is truly responsive and relevant to the matter."

Apart from cost savings, computer-assisted document review can produce increased control and predictability. The process is decidedly different from human linear review, where an army of junior attorneys, paralegals, and/or contract attorneys review documents in cases about which they know little or nothing. See 2012 WL 607412, at \*2 (Peck, M.J.). In predictive coding, seed sets are reviewed by a small group of counsel with detailed command of the facts and issues. Predictive coding software takes the work product from these senior reviewers and "trains" itself to identify responsive documents. The same small group of senior reviewers engages in iterative reviews of predictive coding results, refining the responses along the way. See *id.*

### Will Courts Continue To Embrace Predictive Coding?

It is important to keep the *Da Silva* decisions in perspective. Both are preliminary discovery rulings that on their face reserve final judgment on the ultimate reliability of this new approach. Plaintiff can still challenge the end result of the computer-assisted production. But the opinions strike recurrent themes and demonstrate a judicial willingness to look for solutions to the problems inherent in reviewing large volumes of ESI.

From Marc Polk's perspective, predictive coding is not that huge of a leap from tools already in use:

Predictive coding is really a natural progression in the evolution of tools to meet the demands of discovery of electronic information more efficiently. It can help prevent fishing expeditions and reign in overly burdensome discovery demands. It takes term searching and coding to the next level to not only help identify and prioritize relevant information more accurately, but also more quickly eliminate non-responsive material.

Whether other courts follow the decisions in *Da Silva* may depend on how effectively counsel demonstrate to them the real limitations of human linear review. Thinking of human review as the "gold standard" is "a myth." 2012 WL 607412 at \*9 (Peck, M.J.). A growing body of data supports the accuracy of predictive coding, particularly when measured against the mythical gold standard. See *id.* Counsel will likely insist that any party objecting to the use of predictive coding delineate an alternative proposal, its

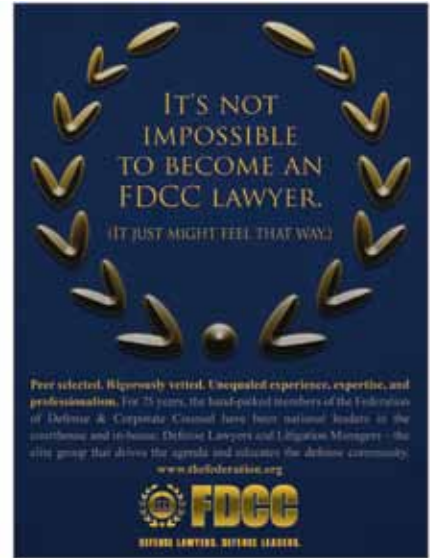
cost, and its outcome.

The federal court's recognition of the need for cooperation, disclosure, and transparency amongst counsel in the e-discovery arena also may weigh in favor of future acceptance of predictive coding. The potential cost savings of predictive coding will motivate producing parties to embrace disclosure and transparency. The *Da Silva* ESI Protocol provides a roadmap that would make it difficult for objecting parties to complain.

Predictive coding is only a tool, "not a magic, Staples-Easy-Button, solution, appropriate for all cases." *Id.* at \*8. But it is a tool that offers great promise to ameliorate issues that burden our civil justice system. Boston Scientific's Tim Pratt looks to the future with some optimism:

Corporate counsel want to control the

ever-escalating costs of e-discovery. They also want predictability and manageability. One can achieve all of that when open-minded litigants approach the process in an innovative, problem-solving way. Judges like Magistrate Judge Peck and District Court Judge Carter are dealing with the issues in a way that accomplishes the goals of the Federal Rules of Civil Procedure and that requires continued collaboration and cooperation by litigants. That, together with the efforts of organizations like Lawyers for Civil Justice in championing changes that level the playing field and allow for a truly just, speedy and inexpensive resolution to every dispute, provides some hope in managing, if not resolving these serious issues.



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## LITIGATION

Civil lawsuits are an unavoidable fact of life in the insurance industry. This special section dedicated to insurance litigation will keep you informed about key trends with featured reports, interviews with experts, white papers, recommended resources and the latest news. Find out about critical court cases and learn what strategies insurance companies and industry attorneys are deploying to control legal costs—and win cases.

### NOTABLE QUOTABLES



**Key Coleman**  
MANAGING DIRECTOR AT ADVISORY  
SERVICE GRANT THORNTON  
"[D&O litigation] has become death by 1,000 cuts. Look out for the small non-class-action suits." [Read More](#)



Louisiana Insurance Commissioner Jim Donelon called the \$105 million award to Louisiana Citizens Property Insurance Corp. policyholders a "potentially devastating event" because it puts the last-resort insurer of coastal properties at a disadvantage heading into the hurricane season this year. [Read More](#)

### FEATURED REPORT



**The Long, Lethal Shadow of Asbestos**  
As anyone in the United States with a TV or Internet connection probably knows, lawyers want you if you've been exposed to asbestos, and they're paying—a lot—to get you.



**Conflicting Chinese Drywall Coverage Decisions**  
The courts have remained largely divided in their interpretations of policy language and exclusions in these cases, as we learn in this interview with attorney John Mumford.

### Proving Fine Art Damage: It's All in the Details

By Stephen Halbeisen | MAY 31, 2012  
To realize subrogation potential on a claim involving fine art, it is crucial to prove the cause of loss while understanding the recoverable measure of damages.

### Cost-Control Case Study: Miami-Dade Public Schools

By Bonnie Cavanaugh | MAY 21, 2012  
Creating best practices in Workers' Comp for many insurers now means going beyond the basics, digging deep into their claims history, and "making manufacturing better at manufacturing Workers' Comp."

### The Right Stuff

By Bonnie Cavanaugh | MAY 21, 2012  
Finding the right insurance carrier to help a company mitigate its Workers' Comp costs is key, says Mary Beth Pittinger, vice president and executive underwriter of Workers' Comp for the Chubb Group of Insurance Cos.

### In Control: Strategies for Keeping a Lid on Workers' Comp Expenses

By Bonnie Cavanaugh | MAY 21, 2012  
Controlling Workers' Compensation costs is a process that needs to start at the very top: Those in the C-suite need to commit themselves to creating a zero-injury culture at their organizations, says Calvin Beyer, head of manufacturing for Zurich North America Commercial's customer industry segments.

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### TRENDING & MOST POPULAR

#### MOST POPULAR TRENDING

1. Top 25 Living Legends of Insurance -- Slideshow
2. Insurance Regulation Report Card: Top 5 and Bottom 5 States
3. 6 Unusual Auto Claims

### CLAIMS-HANDLING GUIDELINES

Claims Magazine is providing the following free guidelines and regulations in order to help adjusting professionals stay abreast of each state's unique property and casualty claim-handling requirements.  
[View our State Guidelines »](#)

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## PUBLIC RELATIONS

In addition to advertising, we have placed feature stories online and in print profiling FDCC leaders discussing the value of FDCC membership. For example, *Of Counsel*, a high-quality national management-oriented magazine

has profiled a number of the FDCC's leaders, including General Mike Neil and Vicki Roberts. Tim Pratt, the General Counsel of Boston Scientific and another member of the FDCC Executive Committee, was featured in *Walters Kluwers Corporate Counsel Profiler*.

# The Metropolitan Corporate Counsel

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## FDCC's Defining Motto: Defense Lawyers. Defense Leaders.

The Editor interviews Edward M. Kaplan, Member, Sulloway & Hollis, PLLC and President-Elect, FDCC.

**Editor:** Describe your practice and your history with the Federation of Defense & Corporate Counsel (FDCC).

**Kaplan:** My practice is focused primarily on labor and employment law, representing major medical centers, corporations, utilities, educational institutions and state retirement funds throughout the Northeast. I provide outside counsel for labor and employment matters, routinely work on compliance and regulatory issues and represent clients before administrative agencies and in state and federal courts throughout New England.

I've been an FDCC member since 1991 and gradually became more involved, first as chair of the labor and employment section then in other substantive areas. I was elected to the board in 2005 and then as an officer in 2011. The usual officer rotation for the FDCC involves being secretary treasurer, then president-elect and, in the fourth year, chairman of the board, and I am following that pattern with my own involvement.

**Editor:** Please talk about the FDCC's mission and membership.

**Kaplan:** FDCC's mission is focused on three fundamental principles: knowledge, justice and fellowship, and we take those issues very seriously. We fulfill our educational mission by providing our members – and often larger audiences – with dynamic continuing legal education programs. We have approximately 28 substantive law committees that drive this



Edward M. Kaplan

process and ensure that their membership is current and their programs are up to date and relevant.

We offer broad-based programming during our biannual meetings. For example, the annual Trial Masters Program – considered among the best trial lawyers in the country – involves five or six members who teach different aspects of trial practice. While this group draws from a membership that is heavily weighted toward defense and corporate counsel, the issues covered are relevant for all. Sample topics include strategic jury selection to ensure a fair and balanced opportunity for the defense, limiting and addressing damages, developing issues and themes and then presenting evidence to help jurors draw the right conclusions.

FDCC holds two meetings a year, at which our substantive law sections meet to discuss specific topics. We also hold plenary sessions to cover general topics,

such as complex insurance coverage issues relating to floods and hurricanes, and corporate counsel risk exposures and responsibilities in connection with the development of new federal reporting criteria. We engage speakers to talk about negotiation, arbitration and mediation strategies that are appropriate and necessary for all of our corporate and outside counsel members, not just those in the insurance industry.

Our total membership is limited to a highly qualified group of 1,000 defense lawyers plus another group of approximately 300 members, including corporate and international counsel and members from the professional insurance claims area. Typically we host around 700 participants at our winter meeting and up to 1,000 at our summer meeting, and members have been bringing their families to these meetings for years, forging great friendships throughout the world.

Being a relatively small group allows our members to develop productive friendships, and this aspect of FDCC membership provides a remarkable benefit for our members' clients. I know, for example, that I can pick up the phone and call an exceptional lawyer qualified in virtually any U.S. and some foreign jurisdictions, tapping into their expertise for my clients.

Thus, we address the knowledge and fellowship components of our mission. We'll address the justice component later in this discussion, but, in general, these efforts work toward the goal of establishing and preserving a level playing field in the courtroom. We observe legislation that may tip this balance unduly toward plaintiffs, and we'll address issues as they arise, including speaking out and testifying as necessary.

For further information, please visit [www.thefederation.org](http://www.thefederation.org).

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**Editor:** Tell us more about FDCC's membership, including foreign and corporate counsel members plus insurance industry professionals.

**Kaplan:** We have many foreign members from countries like Australia, Belgium, Canada, Bermuda, France, Germany, Hong Kong, Ireland, England, Israel and Spain. We offer an international program in which Canadian and Spanish members are particularly active but which also provides wonderful insights to our U.S. members. We hold a meeting once every six or seven years at an international location, such as a recent meeting in Munich and numerous ones in England.

Our corporate counsel contingent is very strong, including general counsel and supporting in-house counsel, and our current secretary treasurer and FDCC's next president-elect is the general counsel for Boston Scientific. Timothy A. Pratt has been very active in the organization and is our first corporate counsel substantially involved in chairing various committees. This is a wonderful development for our organization, clearly reflecting that we are very open to and involved with corporate counsel members.

When FDCC started 76 years ago, the defense bar and the insurance industry had a very close working relationship; thus, historically, our organization has enjoyed a natural fit with individuals in the claims profession. Our membership includes representatives from virtually every U.S. insurance company, and they participate on every level in our organization.

**Editor:** What is the selection process for membership?

**Kaplan:** Our selection process is controlled by a very independent admissions committee charged with investigating and then recommending qualified individuals who are nominated for membership. FDCC seeks lawyers, particularly defense counsel with demonstrated skills, who are respected by their peers, the plaintiffs bar and the trial or administrative judges before whom they practice.

In order to make that determination, our admissions committee of about 30 members will assign an applicant to a particular committee member, who will send out as many as 100 letters to colleagues with whom the applicant has tried cases. We compile a list of cases and

significant matters in which the applicant was involved during the prior four or five years so that we can seek feedback from their adversaries, judges and other lawyers in their communities.

We identify prospective lawyers by approaching FDCC members and those from sister defense organizations. There is an extensive vetting process that also ties in with our fellowship mission inasmuch as we ask compatibility questions like, would you have this person to your house for dinner? These considerations are critical to fostering the strong working and social relationships that our members enjoy for many years.

**Editor:** The FDCC is hosting a Corporate Counsel Symposium on September 12-14 in Philadelphia entitled, "What Corporate America Can Expect from the Winner of This Year's Presidential Election." Can you give our readers a preview of the agenda for this event? Are corporate counsel who are not members invited to attend?

**Kaplan:** The Corporate Counsel Symposium is built on the same model we use for our Insurance Industry Symposium, which is to say that while any FDCC member can participate, they must invite a corporate counsel to attend with them. As a result, many non-member corporate counsel who may be clients or friends of our members are able to attend. This requirement also helps to foster those partnerships, and both symposiums have been wonderfully successful.

This year's symposium will feature discussion of relevant topics, including some purely business-related issues, such as law department management within the corporate structure and how to prepare for and manage through crises. There will be a very important discussion about criminal statute enhancements that are threatening corporations. There are a number of recent cases, for instance, in which corporate counsel at various levels were charged with violating reporting requirements and subjected to criminal penalties.

**Editor:** Please talk about the FDCC's roster of legal resources, including those aimed at advocating for amendments to the Federal Rules of Civil Procedure and efforts to obtain changes in state court rules or legislation applicable to e-discovery. What is

your level of involvement with LCJ?

**Kaplan:** While we do not lobby in the traditional sense, FDCC designates a representative in every state for the purpose of enabling us to react immediately to issues, particularly legislative developments. If a state legislature passes, or is considering, a statute that is detrimental to the interests of the clients we represent or to the defense bar in general, we want to immediately alert those individuals and mount an appropriate resistance campaign. Such action may involve testimony at the state level or letter writing campaigns, and we recently have joined with other defense organizations in an aggressive effort to seek revision of the discovery provisions under the federal rules.

Obviously, this effort harmonizes with LCJ initiatives, and the FDCC is very involved with and supportive of LCJ's work at the federal and state levels. Every third year, LCJ's president is a member of the FDCC, and Wayne Mason – a former FDCC president – is the current president-elect of LCJ. I recently participated in the effort to change electronic discovery processes that are currently being considered by the civil rules committee, and we've been very active in supporting the materiality standard in connection with the preservation of electronic data.

Corporations are concerned about the cost of retaining information, and the defense point of view maintains that data preservation should be based on its materiality to a given complaint or claim – not on the mere fact of its existence.

In a recent submission to the civil rules committee, I was amazed at a particular comment stating that an everyday owner of a single iPhone plus a laptop computer who becomes involved in litigation likely possesses 25,000 bankers' boxes of information. That statistic is a perfect and graphic depiction of what we are working to prevent, and the FDCC participates in those efforts at every level.

I serve on LCJ's board, as do our president and chairman, and, as mentioned, the next president of LCJ will be one of FDCC's prior presidents, so we're very active in those issues.

**Editor:** Do you file amicus briefs?

**Kaplan:** We file amicus briefs in issues of relevance to our goal of maintaining an even playing field for parties on both

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sides of the courtroom, such as was reflected in a recent amicus filed at the request of a Massachusetts member. Essentially, the case involved wrongful death and tort claims premised on alleged building code violations. The case was tried before a jury, which found no fault with regard to building code violations; however, the superior court judge awarded \$6 million in treble damages for violation of the Massachusetts Consumer Protection Act. Our amicus was filed in connection with the subsequent – and as yet undecided – appeal, not only in support of a claim we defend but also in support of broader efforts to define the reach of consumer protection acts.

We also filed an amicus brief recently in Washington State, challenging a lower court decision that affected an insurer's right to have a jury decide the essential elements of a bad faith claim. We argued that an insurer is entitled to such due process rights and that these rights were violated by the lower court decision.

These are good examples of issues our accomplished amicus committee will pursue – consistent with our goal of ensuring a level playing field for all, and I estimate we file three or four per year. We avoid amicus roles that are inconsistent with membership goals, which are multidimensional and therefore require that we be selective.

**Editor:** Please discuss other FDCC activities, such as your Leadership Institute.

**Kaplan:** One exciting part of the FDCC organization is our Federation Foundation, which is a separate entity that raises money to provide seed funds for programs – including the Leadership Institute. This is an excellent program we offer every year or two that explores the core qualities of leadership and how individuals can master them in order to become leaders of their law firms, corporations and communities.

We also offer the popular Litigation Management College, which is conducted by FDCC members and geared to help claims professionals learn how to analyze and deal with litigation and resulting claims. Here, participants spend a week analyzing a single fact pattern from start to finish and understanding how a defense lawyer would handle the situation. Our Law Firm Management Conference is held every other year and is principally attended by law firm administrators and managing partners exploring the nuts and bolts of running a law firm.

At last year's summer meeting, the Foundation joined forces with Colonial Williamsburg, which has an incredible program – themed on what can be learned from the past – to develop a more educated and engaged citizenry. We are partnering with them by presenting and engaging in schools with students based on their existing learning materials. It's a very exciting program that hits home with our members who already have contributed time and energy to school boards.

All the programs I have mentioned,

including the Corporate Counsel Symposium, happen as a result of volunteer efforts and substantial investment of time by our members.

**Editor:** What are your plans for the future of FDCC?

**Kaplan:** Internally, my focus will include analyzing our current financial practices and aligning our committee structure – both administrative and substantive – to best facilitate advancing our mission and goals. Externally, my efforts will center on educational initiatives, such as a webinar series currently under development, where firms can spend an hour and a half with new or experienced attorneys in a conference room and explore very relevant topics.

My plans include ongoing focus on issues that remain current for the defense bar, such as the electronic courtroom, but also to match these issues over to the corporate side for our in-house members, working with them to develop the company story and trial themes. We'd like to do a session on persuasive writing, which is a dilemma for all members, and also on understanding and improving the already strong relationship between inside and outside counsel.

FDCC's new tagline is "Defense Lawyers. Defense Leaders." and that's absolutely who we want to be. We want to be leaders of the defense bar and we are confident that our members have the skills to earn that privilege and make that claim.

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## D&O Insurance In The Dodd-Frank Era: What You Need To Know To Protect Your Directors And Officers

Jennifer E. Johnsen

FEDERATION OF DEFENSE & CORPORATE COUNSEL (FDCC)

It's 5:00 p.m. on a Friday, and one of your company's directors informs you that he and your company were just sued. What are the obligations of the company and its insurer to the director? What if the defendant is you?

The last decade has seen increased liability exposure for directors and officers due, in large part, to financial scandals, accounting restatement cases and the resulting increased regulation imposed by the Sarbanes-Oxley and Dodd-Frank

Acts. Directors and officers ("D&Os"), targeted more frequently in the gun sights of zealous shareholder advocacy groups, are more focused on indemnification and advancement rights, both under their company's bylaws and other corporate documents and also under the company's D&O insurance policy. According to Brian Walters, general counsel at Matthews International Corporation, "Companies want to recruit and retain experienced, qualified individuals to serve as directors and officers. In what has become a more regulated and litigious environment, comprehensive indemnification agreements and D&O policies that provide broad coverage are considered necessary prerequisites by increasingly discerning director candidates."

As in-house counsel, you must know and understand how your company and its insurer should respond to the five o'clock bombshell. First, look at the company's bylaws, indemnification agreements and employment agreements. Do those documents require the company to advance and indemnify its D&Os? If so, under what circumstances?

Second, assess what kind of coverage your company's D&O policy provides. D&O policies are indemnity, not liability, policies that provide coverage for claims made against a corporate insured's past, present and future directors and officers. Typically, D&O policies contain two parts – "Side-A," which provides coverage for D&Os when the



Jennifer E. Johnsen

corporation has not indemnified them, either by choice or by operation of law, and "Side-B," which provides coverage for sums a corporation is required or permitted by law to indemnify D&Os. Some policies also include "Side-C" or "entity coverage" to insure the company itself against securities claims. It is imperative you understand the type of coverage your company purchased.

Third, determine how the coverage applies to covered claims. Some D&O policies provide for the advancement of fees and expenses as they become due. Others reimburse the company only for those sums the company has already indemnified after a full and final decision on the merits. Significantly, these policies are generally wasting policies – the payment of fees erodes available policy limits. Be aware of conflict and representation issues that might arise because of wasting policies and carefully consider these factors if you are permitted to select counsel under your policy.

Fourth, assess any limitations on coverage. D&O policies often contain "conduct" exclusions that operate to exclude coverage where the insured gained any personal profit or advantage or where the insured committed dishonest or fraudulent acts. Look to see whether your policy requires a "final adjudication" adverse to your D&Os before the exclusions are triggered. Many courts have held that "final adjudication" exclusions do not apply to pre-judgment settlements. In response, some insurers have replaced the "final adjudication" language with a requirement that an insured's conduct "in fact" took place. There is no bright-line test for the "in fact" exclusion. Some courts have held the "in fact" requirement

*Jennifer E. Johnsen has been a member of the Federation of Defense & Corporate Counsel since 2008. She is a Shareholder at Gallivan, White & Boyd in Greenville, South Carolina, where she chairs the firm's Business & Commercial Litigation Group. Her practice focuses on business and commercial litigation, insurance coverage and life, health and disability benefits litigation. She is a graduate of Suffolk University Law School and obtained her undergraduate degree in Politics from Mount Holyoke College. She has been named in The Best Lawyers in America® in the practice area of Employee Benefits (ERISA) Law and currently serves as Vice Chair of the FDCC Life, Health and Disability Section. She is a member of DRI and the South Carolina Defense Trial Attorneys Association, and she is a past president of the Greenville County Bar Association.*

Please email the author at [jjohnsen@gwblawfirm.com](mailto:jjohnsen@gwblawfirm.com) with questions about this article. To learn more about FDCC, visit [www.thefederation.org](http://www.thefederation.org).

D&O policy should include carve backs of coverage under certain circumstances, including for claims asserted with the assistance of corporate whistleblowers.

Sixth, if your Friday afternoon fire drill is the result of an SEC investigation as opposed to a lawsuit, determine whether your D&O policy excludes responses to regulatory investigations. If your D&O policy has such an exclusion, consider obtaining a stand-alone policy to fill that gap. In addition to the added protection for corporate investigations, monies spent under a stand-alone policy will not erode the limits of the company's primary D&O policy.

Finally, if you are the Friday afternoon defendant, determine whether the company's D&O policy covers in-house counsel. While claims against in-house counsel are certainly not as prevalent as those against D&Os, in the post-Enron, Sarbanes-Oxley/Dodd-Frank era, such exposure may be on the rise. Most D&O policies only afford coverage for elected directors and appointed officers. While some in-house counsel serve as directors or officers, coverage depends on whether in-house counsel is being sued for conduct as a D&O or as in-house counsel. If

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policy does provide coverage counsel, be aware that such will erode the available coverage. The company's other D&Os raiseable conflict issues. Some have separate professional policies specifically designed for counsel. Those policies have limits of coverage and, therefore, erode the limits available to your D&Os. Understanding the obligations of the company and its D&O carrier with advancement and indemnification is essential. Brian Walters says, "The value-added proposition for in-house counsel is not limited

to protecting just the interests of shareholders, customers and employees on behalf of the corporation. It necessarily extends to assessing how best to be prepared, in advance, to effectively mitigate and contain potential liability for the company's directors and officers by developing, implementing and monitoring thorough and thoughtful D&O indemnification and insurance coverage strategies." If your position may put you in the five o'clock hot seat, then it is critical that you review your company's D&O policy in advance to assure that adequate protection is in place and to understand what limitations may apply.

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LAWYERS  
CAN BECOME  
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**FDCC**  
DEFENSE LAWYERS. DEFENSE LEADERS.

# OF COUNSEL

The Legal Practice and Management Report

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## OF COUNSEL

The Legal Practice and Management Report

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### In This Issue

**Pressure Points.** In a recent survey, managing partners at 81 firms in the U.S. and Canada positively underscore what continues to be a think in their strategic armor: the ongoing deflation of practice groups. Group leaders are too often selected on the basis of their books of business and team effectiveness is typically impeded by excessive administrative responsibilities. **Page 1**

**Little Big Guy.** There are dangers in being those. Idaho's biggest law firm when smaller competitors warn clients that you're just too big to be responsive. Harley Travel Emis & Hawley has met this challenge head-on with an ad campaign depicting itself as a sumo wrestler dressed in halcyon rights. Message: Who says we aren't flexible? **Page 7**

**Guarded Optimism.** The evidence seems to confirm that, for many firms, 2011 was a robust year indeed as margins began to increase well before the current hiccuped recovery. A 2012 survey by John Smock, Peter Giuliani, and Joseph Walker confirms those results, yet, discloses a palpably cautious sense among law firm managers of what's coming next. The survey provides hard data on how diverse firms assess a broad range of issues—from underproductive partners and client responsibility succession, to leverage strategies and practice group management—with recommendations on the steps that legal service providers must now take if they're to continue navigating the "course correction" that has permanently transformed their market. **Page 5**

**Green as Gold.** For law firms, sustainability is no longer just good business. It's big business. As Lori Tripodi shows, there are two sides to this story. First, major corporate clients now demand green initiatives from their service providers. Second, the eco-revolution has spawned robust practice development opportunities—trading-marketing, greenwashing, real estate, and more. **Page 19**

**Resolute Intent.** Vicki Roberts isn't just showing smarts when she says she'll spend more money than a case is worth to discourage specious claims. As Counsel and Vice President of Meadowbrook and Century Insurance Groups, she identifies issues outside counsel with proven trial skills, as well as a thorough familiarity with her company's practices and products. **Back Page**

### Failure to Excel

#### New Survey Shows Many Practice Groups and PG Leaders Are Performing Below Par

So much for excellence. The standard operational model that has served most law firms for years—the practice group structure—has flaws in the system.

That's the conclusion of a survey by Altman Weil, based on interviews with 81 law firm leaders, which was released in March. Managing partners told the Newton Square, Pa.-based consultancy that "only 49 percent of their practice groups and 52 percent of

their practice group leaders are very good or excellent in overall performance," according to the *Well Practice Group Performance Survey*. What that means is that more than half of the respondents feel their

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### Of Counsel Interview . . .

#### Meadowbrook Insurance Counsel Navigates "Each Turn in the Path"

Some people are simultaneously very tactical and extremely honest in their professional dealings. Vicki Roberts, vice president and counsel to Meadowbrook and Century Insurance Groups, is one of those people.

"Vicky has a way of sticking you with a cattle prod and making you feel like you've charmed at the same time," says Roberts's brother, Peter Flood, senior vice president of operations for the large national company. "I mean that as a real compliment. She has healthy relationships with the people she deals with and she's not afraid to challenge people. And, the manner in which she does that is tactful and professional but done with such confidence. She gets us to do the right thing and that's the bottom line."

Roberts has worked in private practice, first at Rawle & Henderson and then at Weber Gallagher Simpson Stapleton Fritz & Newby, both headquartered in Philadelphia.

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But she's spent most of her career working in-house in the insurance coverage and environmental law arenas. She joined Meadowbrook in 2005 and has helped steer the company in the right direction on countless matters and cases, according to Flood, and she's well-connected.

"Vicky has deep extensive experience; she makes smart decisions in managing litigation; and she's a good judge of what will likely come from each turn in the path that we take," Flood says. "For us, that's a hugely valuable skill. And, I don't think I know anybody who's as well networked as Vicky. It seems she knows all the people in the business. I count her as a good friend and I suspect many other people do as well."

Recently, Roberts talked with *Of Counsel* about her career, the differences and

Continued on page 25

"When I call, FDCC lawyers will drop everything and help even if it's to refer me to someone else who has better expertise for the matter that I'm calling about."

### Of Counsel Profile

Continued from page 28

simulation of working in-house and in private practice, why sometimes it's best to spend significant resources to fight a small claim, what she looks for in retaining outside counsel, and other topics. The following is that excerpted interview.

**Of Counsel:** Vicky, you've spent most of your career as an in-house attorney, but you did spend several years at a couple of Philadelphia law firms. What are the most striking differences about practicing law in-house and practicing at a private law firm?

**Vicki Roberts:** The biggest difference, I suppose, is that in private practice you're always waiting for the next client to send you work. You always have that sword hanging over your head. Obviously, as an in-house lawyer you don't have the problem of generating new clients. You have a captive client so you don't have that issue.

*If we've got a \$10,000 claim and it's going to cost us \$50,000 to prove our case are we advancing the ball, so to speak? The answer to that is often "no." But sometimes, it's "yes."*

But really, I think there are more similarities than people acknowledge and talk about. People often play up the differences. I think there are a great number of similarities in that we have clients. They tend to be either individuals or departments within the company, and they are certainly all related. But we still do have various clients and we do need to meet those clients' expectations. And, if we don't, we're out of a job.

### Fighting Small Claims

**OC:** Where do you get the most satisfaction from your job? That is, what do you do that's especially rewarding, where you feel that you helped the company a lot?

**VR:** Generally speaking, I get a lot of satisfaction from problem-solving. Our claims and underwriting and senior management clients look for help in solving problems and we try to come up with creative ways to get the job done cost-effectively while staying within our business goals. After all, we are in business, and we're in business to make money for our shareholders. So we have to keep our business goals in mind and stay true for example, to our policy language in coverage matters while not spending a disproportionate amount of money to get the best results.

If we've got a \$10,000 claim and it's going to cost us \$50,000 to prove our point are we advancing the ball, so to speak? The answer to that is often "no." But sometimes, it's "yes."

**OC:** When it's "yes" it is because you're worried about the president that settling the claim might set off other work, are you looking down the road to the future?

**VR:** Right, because the bigger business goal is to defend our firm, and it may be a firm that is critical to a particular book of business in the state where the litigation is pending. So it is worth it to spend a disproportionate amount of money on that particular piece of litigation to get the results we believe we'll get from the trial court or the appellate court.

**OC:** In a sense, that would be an example of long-term planning.

**VR:** It is, and that's why we need to be in constant communication with our business clients to see how best to serve their goals—not in an individual claim but across a book of business.

**OC:** So that's how you get satisfaction—by solving these problems. Let's look at the flip side, if we could. Vicky, what's the biggest challenge you face, or put another way, what frustrates you about your job?

**VR:** The biggest challenge in-house is that we deal regularly with many jurisdictions and, at times during the year, with all 50 jurisdictions. Your legal skills change. Rather than being an expert in the law in one or two states, you become more like a jack-of-all-trades/master-of-none. We know enough to be dangerous in all 50 states, so to speak, but it's all about balancing what you know and can research in any particular jurisdiction with the need to partner with outside counsel, whose practice focuses on that particular state.

We really have to keep up with all the nuances of the law and advise our internal clients about changes in the law in many, many jurisdictions. Of course, it's not unique to us. In-house attorneys in insurance companies and many other companies that, for instance, distribute products in all the states face the same challenge. But it's one of the challenges that I find between an in-house practice and a private practice, which not always but often focuses on a few number of states.

**OC:** What do you look for when you're hiring outside counsel? And, here's a related question, what do they do wrong or fail to do that leads to you firing your outside counsel?

**VR:** We practice in a niche area, of course: insurance coverage. So we're looking for depth and expertise in that area. Someone who, for instance, is a superb trial lawyer but has very little experience with insurance coverage is not going to be able to partner with us at the level we need. Unless you have a fundamental understanding and have devoted many years of your practice solely, or at least almost exclusively, to insurance coverage, you're not going to be a good fit with us. There are a lot of superb insurance-coverage lawyers out there.

We look for coverage lawyers who also have extensive trial experience because we're involved in a lot of litigation. So we want not only litigators but people who we're going to actually take the case to trial, if that becomes necessary. Insurance coverage is usually just a matter of law for the court, so most cases are resolved at the summary-judgment level but that's not always the case. And, if we do have to take a case to trial, we want to be sure that we have that expertise.

*We're the client and so we want advice and we want pushback from our outside counsel but the final say-so on strategy has to be ours.*

Everybody in my department has been in both private practice and in-house. Everyone understands the business of insurance and the legal issues of insurance coverage. We also look for attorneys who understand our business. They need to understand the law, naturally, and they also have to understand how an insurance company operates, what drives us. We hope and really expect that they will learn our business, what kinds of policies we write, what forms are important to us, what the nature of Meadowbrook's business truly is—and we help them learn all this. We hold meetings with them where we explain the nature of our business. So we try to partner with them as much as we can. But they have to have a fundamental understanding of the business of insurance.

### Doing It "Our Way"

**OC:** So what about the second part of the question? Have you had to part ways with your outside counsel and if so what was the cause of it?

**VR:** We have. It hasn't happened often, fortunately. But it has happened on occasion when the type of staffing that we wanted

on cases wasn't there. Billing practices can sometimes come into it. But it's more often a reflection of a law firm wanting to handle the litigation their way and not our way. Quite frankly, we're the client and so we want advice and we want pushback from our outside counsel but the final say-so on strategy has to be ours, and if they're not willing to work with us and do things without running them by us first, then we have to go to have to part ways and go find someone else. As I said, this doesn't happen very often.

**OC:** What advice would you give an outside attorney who has all the skills, knows the insurance business, and knows how to take a case to trial if he or she but doesn't want to be retained by Meadowbrook?

*When I call, FDCC lawyers will drop everything and help even if it's simply to refer me to someone else who has better expertise for the matter that I'm calling about.*

**VR:** I want to see their expertise first, to see that they've published an article or spoken at industry meeting on a coverage topic that would be relevant to us. That gets your foot in the door. After that it really has to be a need basis for us in that particular jurisdiction and there has to be a willingness to be in a dialogue. I'm very fortunate in that all the lawyers on my staff have many years of outside experience and we like to partner with our outside law firm so that's why it's important that there's back-and-forth on strategy. We're not the type of operation that sends the case to outside counsel and wants to know when it's over. We want our outside attorneys to

pick up the phone, call us, and talk about the cases.

**OC:** Finally, let's talk about your involvement as a director of the Federation of Defense and Corporate Counsel. What attracted you to the Federation? Why did you become so involved in it?

**VR:** I like many things about that organization. I was nominated by a senior vice president of CGNA, who was then a member and was my boss in 1990. I had not known about the FDCC before then. I began attending the meetings regularly, and I quickly learned that this was a unique group of extremely talented lawyers. The meetings provided not only superb CLE [Continuing Legal Education] but also offered fantastic networking opportunities with lawyers all over the country.

There's such a wonderful camaraderie within the FDCC membership. I consider many people in the FDCC amongst my closest friends. We attend each other's children's weddings, we've shared travel together even outside of the wonderful places where the organization holds its meetings.

Professionally, it's been extremely rewarding because it's a preselected group of lawyers, which as an in-house counsel, I can look to as a resource for the best legal advice in any state. I know that if I call on an FDCC lawyer, he or she is ranked amongst the best. When I call, FDCC lawyers will drop everything and help even if it's simply to refer me to someone else who has better expertise for the matter that I'm calling about. That's a wonderful resource to be able to call upon as an in-house lawyer. ■

—Steven T. Taylor

## FDCC WEBSITE

With a new brand identity, it is important to carry that through all the materials, particularly the website, which will be point of entry for most people interested in the FDCC. It's a massive website, with thousands of pages of substantive documents and articles. There was no need for an overhaul, but a redesign was important, to carry the brand throughout the site. We

redesigned the home page to include the new logo and visuals, streamline the interface, and improved the search function to make it easier to find the relevant materials.

We focused significant effort on link-building and search-engine optimization, to promote the site and enhance the visibility across the Internet.

### BEFORE



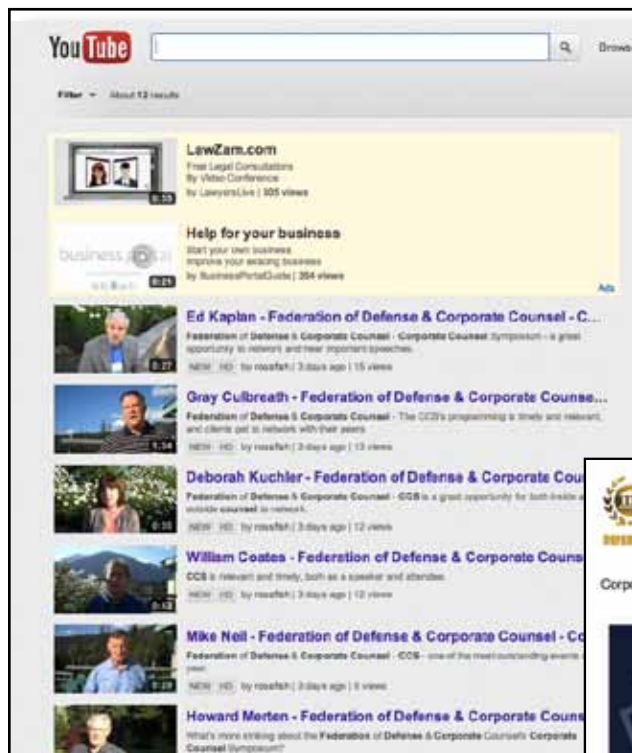
### AFTER



## CORPORATE COUNSEL SYMPOSIUM

One of the FDCC's flagship educational events, this CCS symposium is a valuable way to attract new interest and new corporate members. Given the high quality of the program and its target audience the symposium offered fabulous synergies, for getting FDCC's new branding message to the right people in the right context, while simultaneously helping to market the program itself.

It's a terrific event, and Fishman Marketing worked closely with the CCS Committee to develop a dynamic, interactive, and fully branded website to be used as a model for future programs, including a dozen testimonial videos. All of the tools which offer opportunities to spread the FDCC's new branding image:  
[www.fdccconferences.org](http://www.fdccconferences.org).



## MARKETING TRAINING

At a number of FDCC meetings, we conducted marketing, social media and SEO training, to teach the leadership how to improve the performance of their online materials. We also trained the leaders of the FDCC's other industry conferences regarding best practices in using marketing techniques to increase attendance, build a community, and attain measurable improvements to the conferences' ROI.

Interesting: At the FDCC's recent annual conference in Whistler, BC, the Visibility Committee's hard-working chairman Howard Merten received the FDCC's highest award, for the member who has done the most to advance The Federation's goals. He's been an absolutely pleasure to work with this year.

## IN THE VISIBILITY COMMITTEE'S REPORT TO THE FDCC EXECUTIVE COMMITTEE, HOWARD MERTEN WROTE THE FOLLOWING:

### OUR MARKETING PARTNER:

AFTER AN EQUALLY RIGOROUS VETTING PROCESS, FDCC AND THE VISIBILITY COMMITTEE SELECTED FISHMAN MARKETING, INC. TO ASSIST WITH THE BRANDING CAMPAIGN.

LED BY ROSS FISHMAN, A FORMER LITIGATOR AND MARKETING PARTNER, THEIR DEDICATED TEAM OF CREATIVE DESIGNERS, PUBLIC RELATIONS PROFESSIONALS, WEB DEVELOPERS, AND SEO AND SOCIAL MEDIA EXPERTS, HAVE DONE A GREAT JOB FOR US. ROSS HAS DEVOTED COUNTLESS HOURS TO THIS PROJECT, HELPING US WORK THROUGH A NUMBER OF ISSUES, PROVIDING CREATIVE INSIGHTS, AND KEEPING US FOCUSED ON OUR MISSION. HE AND HIS TEAM ARE CONSUMMATE PROFESSIONALS.

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