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Q&A With Cravath's Daniel Slifkin

Law360, New York (July 12, 2011) -- Daniel Slifkin is a partner in the New York office of Cravath, Swaine & Moore LLP. His experience includes litigations and trials in both state and federal courts throughout the United States, as well as in domestic and international arbitrations. He has also represented his clients in regulatory investigations by both the U.S. Department of Justice and the U.S. Securities and Exchange Commission.

He has expertise in general contract and commercial disputes, as well as with class action defense, securities, intellectual property, shareholder derivative, employment and bankruptcy matters. In recent years he has successfully handled numerous high-profile matters for some of the largest corporations in the world, including Alcoa Inc., Alcatel-Lucent, Morgan Stanley and Vivendi, among others.

Q: What is the most challenging lawsuit you have worked on and why?

In the Vivendi securities litigation, which I have been working on since it started in 2002, we seem to be breaking new ground every day. In 2009, we defended Vivendi in a four-month-long trial against a class of investors, including those who had purchased non-U.S. shares outside the U.S. but alleged violations of U.S. securities laws.

So few securities cases ever go to trial, and this was the only so-called “foreign-cubed” case to do so. We couldn’t seek advice from others who had tried a similar case because nobody else had done it before. When it came to doing jury instructions, for example, there were essentially no precedents to turn to. Even now, post-verdict, the case continues to raise new and complicated issues.

Earlier this year, we won the dismissal of all securities fraud claims brought by Vivendi common stockholders by arguing that the recent Supreme Court decision in Morrison v. National Australia Bank precluded purchasers of foreign stock from pursuing securities fraud claims in U.S. courts. We are now entering a second phase of proceedings with the remaining class plaintiffs dealing with questions such as how shareholders must prove damages under Section 10(b) and how reliance may be rebutted. Because these types of cases never reach this stage, we are again forging our own path.

Q: Describe your trial preparation routine.

In my view, everything that I do in a litigation is in preparation for trial. Trial prep starts from the day we get the case in the door. Every motion, every discovery request, every question in a deposition should be crafted with an eye on getting ready for trial. When you take a deposition, for example, what you're really doing is preparing to cross-examine that witness later on. You're locking them into a certain story.

There is also the more immediate trial preparation after discovery closes when you take the huge body of information you have obtained and start to synthesize it down. In doing so, it's very important not to lose sight of the basic elements of your case. You can make elaborate and detailed chronologies, witness outlines and orders of proof, but what I like to have is a document that is very simple and high-level.

You need to have a checklist to make sure you are hitting all the points that you need to make. I would ask myself: What are the elements of the claims and defenses? What has to be proven at a very basic level? Once I know all the things that I need to prove or disprove and all the elements of claims and defenses, I link up each point to a witness. From there, I have a clear vision of the story I will present through the witnesses. Most of a trial is just asking questions to witnesses, and you need to have a very clear vision of why you're asking those questions and how they advance your client's case.

Q: Name a judge who keeps you on your toes and explain how.

As a young partner, I had a number of cases before Judge Charles Brieant, a former chief judge of the Southern District of New York. He has since passed away, but he was a giant of the bench — the sort of judge who had seen it all before. He fought in World War II, had been a practicing lawyer and had been on the bench for almost 30 years by the time I litigated before him. With that depth of experience, he had very firm ideas of what he needed to hear — and what he didn't — and had no patience for wasting time.

He really drilled in the message that when you stand up in court to speak, you better know the reason for your statement and convey it clearly and concisely. He'd say things like, "This case has a jury of one, it's me, and if I'm not getting it, it ain't being got." He taught me the lesson that when dealing with the decision maker in any situation, you'd better be absolutely sure that he or she understands why you're doing what you're doing. No matter how clever the argument or elegant the rhetoric, if your point doesn't come across, it makes no difference.

Q: Name a litigator you fear going up against in court and explain why.

There is a category of litigator that I'm always cautious of: the experienced local lawyer in a jurisdiction where you are a stranger. Local stars have all the credibility in the world and are comfortable in their environment. For example, several years ago I litigated against Paul Kovacs from Armstrong Teasdale in St. Louis. Paul's an excellent trial lawyer and a name in St. Louis.

When you show up in court in a town you've never visited before, and opposing counsel has spent all of his or her life there, knows the judge and is on a first-name basis with the clerk, you feel that that person has a distinct advantage. You're the guy from New York. What you need to do to level out the playing field is get the court to know you and like you.

Having handled cases all over the country, I have learned that you build local credibility by doing a good job, being honest, and not having sharp elbows. And by not being overly confident. It's always a concern to be the unknown entity, but it's also exciting and rewarding to enter a new environment, persuade people and succeed. I now count Paul among my friends — but I would only want to see him across from me in court again if it's here in New York!

Q: Tell us about a mistake you made early in your career and what you learned from it.

Fresh out of law school, what you know is the law. And a mistake I made as a young lawyer was to say to myself, I know I'm right on the law, and that's all that it takes. But as you litigate and try cases, you realize that the factual development is absolutely critical.

You need to make it crystal clear that your client's position is not just technically correct, but actually and plausibly correct; that your client is right on the merits. You want to persuade people that your client did the right thing and is a good guy. Even if there is some technical, legal reason why you should win, there is no substitute for developing a proper, compelling, well-presented story on the facts.