

Trial Pros: Cravath's David Marriott

Law360, New York (May 26, 2016, 2:44 PM ET) -- David R. Marriott is a partner in the litigation department of Cravath, Swaine & Moore LLP. He has extensive experience litigating at the trial and appellate levels in both state and federal courts, and has been involved with numerous forms of alternative dispute resolution. Marriott's recent matters include representing NCR in three environmental trials concerning the multibillion dollar remediation of the Kalamazoo River and Fox River; Mylan in winning a judgment after trial upholding the validity of its patents on a respiratory medication; a leading law firm in a malpractice suit concerning a commercial mortgage-backed securitization, which was dismissed following his argument before the New York Court of Appeals; and the city of New York and two police officers in a jury trial in a civil rights case regarding alleged false arrest and police brutality. He is an adjunct professor at New York University School of Law and a lecturer in law at Columbia University School of Law.



David R. Marriott

Q: What's the most interesting trial you've worked on and why?

A: One of my most interesting trials was in a patent infringement case in federal court in New Jersey. The patent concerned a drug called famciclovir, which is used to treat infections caused by certain viruses, including herpes. We represented Novartis Pharmaceuticals as the patent holder; Teva Pharmaceuticals was the accused infringer. The science underlying the patent was complex, the prosecution history of the patent was complicated and Teva's counsel cobbled together a long list of arguments to defeat the patent. Our challenge — and what made the case really interesting — was finding a way to distill the natural complexities of the applicable chemistry into a simple, persuasive narrative. That was no easy task, because we had limited access to the key witnesses from our side and had to make out parts of our case through cross-examination of adverse witnesses. Following a six-day trial, the jury returned a verdict in favor of Novartis. So we were not only able to develop and present a compelling story, but we also had a lot of fun along the way and got a great result. Adding to the experience: I was able to try the case with my partner and mentor, Evan Chesler, one of the country's all-time greatest litigators.

Q: What's the most unexpected or amusing thing you've experienced while working on a trial?

A: One of the most unexpected things I've experienced at trial occurred in a civil rights case I handled involving allegations of police brutality. I represented the city of New York and two police officers at a time when police everywhere were under scrutiny. Witness credibility is important in every case, but it was especially important in this case, because the parties had radically different views about what happened. I hoped to be able to score some points on cross-examination by confronting the plaintiff,

who claimed to have been falsely arrested and beaten, with a number of prior, inconsistent statements. But to my surprise, the plaintiff himself did serious damage to his own cause. During opening statements, our account of what the evidence would show upset the plaintiff to the point that he became so disruptive that he had to be controlled by the court officer, furthering our theory that he resisted arrest. From the witness stand, he later accused me of being the detective who had interrogated him following his arrest for armed robbery, calling into doubt the accuracy of this recollection and prompting the court to tell him he was supposed to answer, not ask, the questions. And lastly, on cross examination — in a Perry Mason-like moment — he admitted that one of the accused officers had in fact done nothing to him, showing that he had sued the wrong person. In the middle of the cross, the court called the parties to a side bar and advised plaintiff's counsel that, rather than pursue his claim for damages in the amount of \$30 million, he should settle because, in the court's view, there was no way the jury would ever believe the plaintiff.

Q: What does your trial prep routine consist of?

A: The first thing I do is to immerse myself in the facts. I start with the pleadings. I read the depositions. And I study the key documents. At the same time, I collect the jury instructions applicable to the claim in suit or, in a bench trial, the cases describing the key elements of the claims. After doing that homework, I create a chronology of key events, make a list of my themes and the themes of my adversary and prepare a short summary of what I expect each of the witnesses to say at trial. With those building blocks, I then outline what I expect to say in closing argument to win the case. That outline serves as the template against which I prepare my opening statement, direct-examination outlines and cross-examination outlines. Working backwards from my draft closing helps to ensure that I incorporate into the trial all of the elements required for an effective opening and compelling witness examinations. It also helps me to make sure that my clients' themes are featured throughout the trial. I try to prepare drafts of my outlines, in which I like to write out the questions, as soon as possible before trial. That way I can revise and refine them repeatedly. The aim is to have internalized each point before trial starts so that I can have maximum agility in the courtroom.

Q: If you could give just one piece of advice to a lawyer on the eve of their first trial, what would it be?

A: Prepare tirelessly. And then prepare some more. Little, if anything, can take the place of effective trial preparation. While no lawyer can be too prepared, preparation is especially important on the eve of a first trial. You need to know the facts and the evidence better than anyone. That's your most likely potential advantage, since you cannot call upon experiences at prior trials. You need to anticipate what might happen with every witness — indeed, every question — and think through your response.

Obviously, effective trial preparation cannot be done on the literal eve of trial. It must begin well in advance. Nor is it just about you; it's about preparing your entire team, including, in particular, your witnesses. Witnesses need to know what to expect and how to most effectively and truthfully convey what they know to the trier of fact. Properly preparing a witness to testify at trial is a process that should begin long before trial. Failure to properly prepare a witness for her deposition, for example, can result in deposition testimony that makes it impossible for her to be an effective trial witness. The best way to prepare for trial is to litigate the case from the beginning as if it will be tried. If you do that, then the best thing you can do on the literal eve of trial is to get a good night's rest.

Q: Name a trial attorney, outside your own firm, who has impressed you and tell us why.

A: I have been particularly impressed by Mark Goodman at Debevoise & Plimpton LLP. Mark is co-chairman of Debevoise's commercial litigation group and is very involved in the firm's white collar practice. He is smart, insightful and persuasive — and he fights relentlessly on behalf of his clients. Mark has some really impressive wins under his belt, including a unanimous jury verdict for Bristol-Myers Squibb in a multibillion dollar contract dispute brought by Apotex. Mark is a guy you want as your co-counsel and not as your adversary.

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