

Trial Pros: Gibson Dunn's Marcellus McRae

Law360, New York (March 4, 2016, 2:44 PM ET) --

Marcellus Antonio McRae is a partner in the Los Angeles office of Gibson Dunn & Crutcher LLP. He has first chaired numerous jury trials, bench trials and arbitrations in both federal and state courts. His litigation and white collar criminal defense practices focus on a wide variety of business disputes, internal investigations and criminal prosecutions including defense of individuals and corporations in cases involving allegations of financial fraud, False Claims Act violations, public corruption, violations of federal and state environmental laws, health care fraud, wrongful death, criminal antitrust violations and other matters. He also represents and advises employers in wrongful termination, retaliation and whistleblower claims.



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He has previously served as an assistant U.S. attorney with the criminal division, major frauds section, of the United States attorney's office in Los Angeles. While he was an assistant U.S. attorney, McRae investigated and prosecuted complex white collar crimes (tax, securities, bankruptcy and other business frauds) and traditional crimes that involved both jury and nonjury trial experience with a 100 percent conviction rate at trial.

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

A: The most interesting trial I've ever worked on was the landmark education rights matter titled *Vergara v. State of California*.

First, the issues at stake were critical and compelling — we successfully represented nine California public school children who brought equal protection challenges to various California education code provisions statutes regarding teacher tenure, dismissal and layoffs. In short, the plaintiffs argued that these statutes individually and collectively resulted in the hiring, retention and inability to dismiss grossly ineffective teachers and thereby deprived public school children of their fundamental right to equal educational opportunity while disparately impacting low income and minority students in particular.

Second, the testimony at the trial was riveting in that it included a significant amount of evidence regarding the importance of teachers to a student's short-term and long-term learning and overall success, as well as the staggering loss of lifetime earnings incurred by those students exposed to grossly ineffective teachers.

Third, while I enjoy trying all types of cases for all types of clients, this presented a special and deeply gratifying opportunity to champion the rights of children, a particularly vulnerable and underserved segment of our population that cannot vote or seek redress by themselves.

Fourth, the trial served as an example of the genius of and need for our system of checks and balances. While legislatures may promulgate laws, courts can and must strike them down when they run afoul of the constitution.

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

A: I once had a trial in which one of the adverse witnesses was a former employee of our client, and our defense team was perplexed at the plaintiff's decision to call this witness in the plaintiff's case. We could not think of any scenario where this witness would testify adversely to our client. As we started the trial, the tension and anticipation surrounding what this witness might say mounted. And then finally, this witness took the stand and it was my turn to cross-examine him following the direct examination of the plaintiff's counsel. Within a few minutes of the cross examination, I noticed that the witness appeared to be very emotional and on the verge of weeping. I couldn't ignore the witness' condition for obvious reasons. And in that moment, I decided to ask the witness whether he was okay to proceed even though this ran counter to the basic rule of against asking open-ended question and asking questions to which you do not know the answer on cross examination. To my pleasant surprise, the witness explained that he was so emotional because of how deeply he respected and appreciated our client. Needless to say, the cross examination changed dramatically from that point forward. This was a great lesson in staying in the moment, being fully attuned to the witness and having the courage to trust your instinct even if it flies against conventional wisdom because trials are full of extemporaneous moments.

Q: What does your trial prep routine consist of?

A: My trial preparation consist of four steps. First, I focus on the elements of the relevant claims and defenses, and the instructions and special verdict form that I anticipate will be provided to the jury. The legal elements are the marks that parties have to hit throughout the trial, the jury instructions are the rules of the road and the special verdict form is the compass the jury uses to reach their ultimate decision. I then use all of these variables to: (i) frame my trial themes, (ii) separate the wheat (the evidence that is relevant to and probative of the salient issues) from the chaff (the evidence that is less probative or irrelevant); and (iii) organize my trial presentation including the witness order and the evidence used to corroborate the witnesses' testimony.

Second, I subject each aspect of the trial presentation to a simplicity transformation process where I convert the subject matter and issues in the case into relatable, universally held and, if possible, intuitive concepts for the jury. The most important aspect of trial advocacy is being understood. One of the most important feats you can accomplish as a trial lawyer is reaching that moment when you've convinced the jury that the things you are trying to convey fall within the common experiences and perceptions with which they are familiar. When that moment of clarity occurs, it is as if the jury starts paying you dividends by building on and applying your arguments in ways that persuade themselves and their fellow jurors.

Third, I step back to make sure that at each phase, the jurors will have powerful visual images that capture the essence of what I am trying to convey with the testimony and exhibits.

Fourth, I subject the entire trial presentation to a brevity process where I reduce each phase of the case-

opening statement, witness examinations and closing argument to one- to two- page summaries. We all know it's far more difficult to express more in less space. But being able to reduce the case to a series of micro modules requires the highest levels of discipline and understanding. Achieving this can help your efforts to bring jurors to that same level of understanding.

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: Make sure that, at a minimum, your opening statement and first two witness examinations are ready to go. While the goal is to have your entire trial presentation prepared by the eve of trial, you may sometimes parachute into a case where that level of preparation is not possible. But it is critical to keep in mind that every trial has two faces: what you thought the trial would look like before you started and how it looks after you started, aka the actual trial. And once the trial begins, you will be spending very late nights and very early mornings processing that day's developments, making adjustments and preparing to handle unexpected twists and turns as the case proceeds to verdict. By having your opening statement and your initial witness examinations ready to go, you will not be staring into space or at a blank page when you are first called into action. And being ready to go in this early phase of the trial will give you a chance to hit the ground running as you continue to your daily preparation throughout the rest of the trial.

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

A: Ted Wells has impressed me with the sheer range and diversity of his trials and representations, including complex criminal and civil cases. It also impressive that he brings his advocacy to bear in one high-profile case after another. And then there is the high regard for his intense trial preparation and tenacious advocacy. The other things about Wells that have impressed me are his efforts outside the courtroom towards the advancement of racial justice and equal rights, including his work with the NAACP Legal Defense Fund and the United Negro College Fund.

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