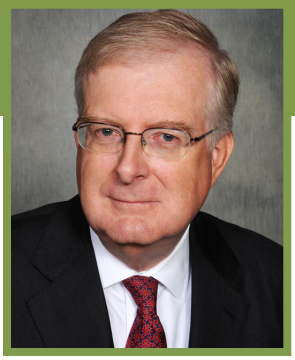

LAW360

Trial Pros: Kirkland & Ellis' Richard Godfrey

Richard C. Godfrey is a senior litigation partner of Kirkland & Ellis LLP, based in Chicago, where he has practiced since 1979, and served as a litigation member of Kirkland's Global Management Committee from 1999 through last year, having reached his maximum term limit. He has acted as trial and appellate counsel in both individual and class action suits involving complex claims in matters involving a variety of practice areas, including among others antitrust, contracts, consumer fraud, fraud and false advertising, employment discrimination, Employment Retirement Income Security Act, Fair Labor Standards Act and state law equivalents, environmental, franchise and distribution, insurance, mass tort, products liability, trade secrets and tax.

Godfrey currently acts as GM's counsel in MDL 2543, the Vehicle Ignition Switch Recall Litigation (SDNY). Prior to that, he served as BP's counsel in MDL 2179, for matters arising out of the Deepwater Horizon Oil Spill (E.D. La). In addition to his practice, Godfrey is a trustee of various cultural and educational institutions, including Boston University, The Chicago Symphony Orchestra, Augustana College and The Churchill Centre. Until last year, he also was a director of the National Center for State Courts.

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

A: Although a close call with respect to two recent trials, my most interesting trial is still that of the Amoco Cadiz, back in the 1980s. At the time, as a young Kirkland partner, I was responsible for all legal, evidentiary and appellate issues, as well as various witnesses in the second trial arising out of the 1978 Amoco Cadiz oil spill off the coast of France. Our team was led by a great trial lawyer, my mentor Frank Cicero. Some 25 years and many trials later, I found myself in Frank's shoes as BP's counsel in the 2010 Deepwater Horizon litigation.

The 1986 to 1987 Cadiz damages trial lasted 174 trial days, and came after Amoco already had been found liable. Plaintiffs included the nation of France, over 100 Breton communities, thousands of businesses and hundreds of thousands of individual French citizens, as well as a variety of private organizations. The compensatory damages sought exceeded $5 billion. The case featured outstanding opposing counsel, representing the French governmental and private interests, as well as the cargo owner, the salvage company and others. To this day, the Cadiz litigation involved the most legally complex and challenging evidentiary issues of any case in which I have been involved.

Most witnesses testified in French, and the vast majority of documents were likewise in French. Depending upon the claim, the governing law was French, maritime, English, German, common law or Treaty. In addition, there were a large number of novel legal, scientific and economic issues, including the gamut of environmental claims, economic loss business claims, damages to fisheries, sea-life and oyster bed claims, as well as governmental services claims. Both sides had world-class experts, including storied French legal experts to prove what the law of France was as it applied to various claims. The judge in 1988 finally determined damages to be a fraction of the many billions sought; appeals were taken; and the case, which began in 1978, finally ended in 1993.

Still today, the Cadiz damages trial had more questions of first impression, complex legal and

evidentiary issues, than any case I have tried, been involved with or read about since.

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

A: My most unexpected event at trial took place just this past January. As *Law360* reported: "The first bellwether trial in the General Motors ignition litigation met an untimely end Friday, with the Oklahoma man blaming the automaker for his Saturn Ion crash withdrawing his case amid accusations by GM that the plaintiff lied on the witness stand about how he lost a new house he'd purchased after the accident." This came about as a result of our receiving — after trial had started — an unsolicited call from a witness we didn't know existed, whose proffered testimony and documents established (in our view) that the plaintiff and his wife had apparently been untruthful with respect to their claims and injures. Confronted with this new evidence, which our trial judge described as a "Perry Mason" moment, the plaintiff voluntarily dismissed the lawsuit. *The Bloomberg* headline summed it up neatly: "GM Wins Big in First Trial Over Deadly Ignition Switch."

While this event just took place, over the years there have been many other unexpected moments — some good, some not so good, but most having an impact on the trial's outcome. So too with amusing trial stories, although one stands out. We were in the middle of our case, with our next witness about to take the stand. The judge called a short recess, and I went out in the hall to fetch him. As I'm walking out with my opposing counsel, what do we see? The witness is not in the witness room, but in the hall, pacing. And lo and behold, my witness has this long sheet of paper in his hand, which he is reading, but when he sees us, quickly thrusts into his pocket. I asked for the sheet of paper, and he says, "I'm not giving it to you!" Now I'm thinking: What's on that sheet of paper? What has this witness done? The plaintiff's counsel, of course, is licking his chops: "Give us that piece of paper!" The witness refused; and so the plaintiff's counsel said: "Great, we'll take this one to the judge!" At this point, the witness — looking furtively down at the floor — says, "OK, have it your way," and shoves the paper into my adversary's hands. He looks at the paper, doubles over laughing, and hands it to me.

What was on that piece of paper the witness had been so reluctant to give us? Well, it was the 23rd Psalm — written out in long-hand. Later, after he had testified, I asked the witness what possessed him to write down the 23rd Psalm? He replied: "Because I needed all the help I could get!" Lesson learned: You can't make this stuff up.

Q: What does your trial prep routine consist of?

A: "Trial prep" starts the day I am retained. Why? Trials are nothing more (or less) than competing stories; more often than not, morality tales. At its essence, something has gone wrong, many times tragically wrong, and the judge or jury is going to want to find someone to hold accountable. So, how do you tell your client's story? What legal principles govern, and what evidence will be admissible to tell that story? If you don't figure out the winning story from the start, well then, your discovery will be unfocused, trial preparations inefficient and often meaningless, and the ultimate outcome likely will be unfavorable. It is that simple.

So, typically, within the first month or so, my trial team and I develop the basic facts as best we can prior to formal discovery. We then take those facts and mold them into an outline telling our client's story, which we then test to determine whether it has the necessary elements to win. That outline eventually becomes the template for the opening statement and closing argument. One word of caution: While you can start with the story you think you want to tell, until you test it in discovery, you can never know for certain whether it is a winning story. Why? Because clients and witnesses have a certain perspective, and their perspective does not always match reality, much less the truth.

"While you can start with the story you think you want to tell, until you test it in discovery, you can never know for certain whether it is a winning story. Why? Because clients and witnesses have a certain perspective, and their perspective does not always match reality, much less the truth."

As simple as all of this is and sounds, over the years I have been surprised by lawyers who never put their basic story together, but are masters of collecting all types of facts in discovery — some relevant, some mildly interesting, but as a whole, none of which have been put together into a story, much less a winning story. Stories, to be interesting and winning, need to be simple, honest and persuasive. You have to make the jury believe in your client, and the facts as you present them. Early on in my career, one of my mentors gave me some pithy advice: "KISS the jury — keep it simple stupid — and the jury will kiss your client." Trite, to be sure, but both wise and true.

I also place a heavy focus from the start on the following elements: aggressive discovery to develop all the facts — vital for the story I want to tell but also to attack or undermine the credibility of the story my opponent is likely to tell; determining the admissibility of the evidence; the governing (often dispositive) legal principles, combined with an active motion practice; developing a trial court record over time for purposes of any appeal; experts; demonstratives and evidence summaries; and the jury instructions. All this leads to the opening, being ready roughly 45 to 60 days before trial; and the closing outline, some 30 days before trial. One final point: throughout the discovery period, we themes test. Why? Because a judge or jury will be the ultimate arbiter, and without themes testing, we run the risk of just selling ourselves, but not the fact finder.

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: I take as a given that the young lawyer has integrity, for if not, then no advice I can give will help him or her. Thus, with that assumption, my single word of advice would be: "respect." At all times, be polite and show respect to the court, opposing counsel, the court's staff and to every witness — particularly those witnesses adverse to you. In my very first trial, I naively thought I was doing a great job in my first cross-examination, and technically, I might have been. But at about the second hour mark, a wonderful trial judge, recognizing that this was my first rodeo, pulled me aside and said: "Counsel, if you keep beating that horse you've killed, you are going to beat him back to life and people are going to like him and not you." Lesson learned.

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

A: I've been privileged to work with some of our nation's best trial lawyers. If I had to pick just one, it would be Steve Neal from Cooley. Why? Excellent strategic vision, brilliant tactics, and a keen sense of the jugular — all combined with a wonderful sense of humor and great timing.

KIRKLAND & ELLIS