

Trial Pros: Fitch Even's Tim Maloney

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Timothy P. Maloney is managing partner of Fitch Even Tabin & Flannery LLP, a national intellectual property law boutique headquartered in Chicago. His practice entails all aspects of intellectual property enforcement and defense, with an emphasis on representing plaintiffs in patent litigation, often multiparty complex litigation. Maloney is an established trial lawyer with a solid track record in numerous jury and bench trials, including cases involving patent, trade secret, antitrust, trademark, unfair competition and professional malpractice matters. He has also successfully argued several cases before the U.S. Court of Appeals for the Federal Circuit and the Ninth Circuit. Maloney has had a primary role in over 50 patent post-issuance proceedings emanating from high-stakes patent litigations.



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In addition, Maloney provides counsel on mergers and acquisitions, technology licenses, patent portfolio sales and other business transactions. Maloney represents clients in a wide range of areas including biotechnology, chemicals and chemical engineering, computer software and hardware, consumer and industrial electronics, energy and clean technology, internet and e-commerce, medical devices and mechanical systems.

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

A: The first big trial that I worked on was the culmination of a 15-year legal battle between the two largest suppliers in an expanding market for pasteurized liquid egg products. Because we don't want people getting sick from microorganisms in food products made with eggs, the eggs are removed from the shell and pasteurized to keep the "bugs" to healthy levels. Although pasteurizing eggs was nothing new, our client was accused of infringing patents that applied some very advanced mathematics that allegedly allowed controlling the pasteurization process in a way that killed more bugs without altering how the eggs taste.

The case was interesting because it involved a wide range of technical concepts involving microbiology, process engineering, advanced mathematics and other disciplines. We had to delve deep into the history of pasteurization to show that if the patents covered anything new, it was a very narrow improvement that our client did not use. The dozens of witnesses who testified included egg farmers, leading scientists, engineers, microbiologists, inventors, business executives, U.S. Food and Drug Administration inspectors, customers, economists and many others. Each side had an impressive team of testifying experts, sort of a Who's Who in egg science and technology. I was a junior lawyer, and was given a ton of witness preparation assignments. It was fascinating to work with our witnesses and help them to not only defend

their own work but to challenge the work of their professional colleagues sitting on the other side of the courtroom. The judge moved the case at a breakneck pace and so everything always seemed to be in motion. When the chaos subsided, our client had a verdict in its favor, which was gratifying.

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

A: The most amusing stuff usually happens in the war room, and I am sworn to secrecy. But each day in court seems to have its own surprises; you just never know what will happen. In the case mentioned above, I was responsible for preparing a scientist from a prestigious university to testify. He could potentially provide very useful evidence about his own early work on egg pasteurization, but he required a lot of attention. We put in extra time to help him feel comfortable, and he was doing fine on the stand when the examination was interrupted by a lunch recess. Shortly after our lead counsel resumed examination in the afternoon session, the witness responded to a question by pulling out a plastic cup and straw from a fast-food place he'd visited during the break. That wasn't in the outline, and I hadn't even noticed that he brought this prop with him to the witness stand. The witness asked permission to use the cup and straw to explain how his system worked. As my partner glared at me from the podium, I wondered if I would still be employed the next day. Neither of us had any idea where this was going. It turned out fine in the end. The witness used his low-tech demonstrative effectively to get his points across, and our jury consultant felt his colorful explanation made an otherwise slow afternoon a bit more interesting. Or maybe she said that just to get me off the hook.

Q: What does your trial prep routine consist of?

A: My trial preparation focuses on turning a complex set of issues and facts into a simple, straightforward presentation, and getting our witnesses ready to testify. When we accomplish these things, everything else seems to fall into place.

I like to start by making a list of key facts that the jury must accept to find in my client's favor. I also come up with commonsense themes that reflect these points. This becomes a tool to guide the seemingly endless number of decisions that will be made while putting the entire case presentation and trial strategies together.

IP cases often involve highly technical facts and unfamiliar legal principles, so you really have to present the case at a level that the judge and jurors can understand. Reinforcing what the jurors will hear in the testimony with visual aids and physical exhibits is a great way to do this. And it never hurts to try to make the case interesting, too. So I actively participate with the trial graphics consultants in preparing charts, graphics, computer animations, etc. I like to have a well-designed set of demonstratives in draft form before devoting too much time to the details of individual witness examinations.

I will then start reviewing and editing witness outlines, but I don't get too far along before engaging the witnesses directly. I want each witness to become comfortable and confident about their testimony. We'll talk about the case in general, where their testimony fits into the issues, how the other side may try to challenge it, etc. I then take the witness through each point that he or she will establish, and each document, demonstrative or other evidence that will be used in the testimony. I let the witness have a lot of input so that the presentation reflects how the witness is most comfortable explaining the subject matter. Once the witness has truly bought into the presentation, we will do some practice Q&A. But I won't rehearse too much or the examination can appear overly scripted at trial. If I stumble through a few questions, or the witness makes a couple of minor mistakes on the stand, it's OK. Makes it more real.

I will also help the witness prepare for likely lines of cross-exam. First-time witnesses in particular have difficulty holding up during cross-examination; it can be intimidating and confusing to them. Experienced witnesses may get a little too confident and make careless mistakes. So we will spend time role-playing, helping the witness understand the other side's perspective, and practicing techniques for being a responsive yet careful witness under cross-exam.

Once our witnesses feel well prepared, then I feel prepared. As trial approaches, I will also work with other team members outlining cross-examination of adverse witnesses, although the best way to prepare myself for crossing key witnesses is to take their depositions during discovery. And somewhere along the way I set aside time to work on opening and closing arguments.

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: Relax, and go earn the jury's trust. If it's your first trial, you are probably feeling overwhelmed and perhaps wondering if you have what it takes to go toe-to-toe in the courtroom with more experienced lawyers. Forget about all that. Everyone in the courtroom is a little nervous. The jurors will see that you just don't look old enough to have decades of trial experience. They will be impressed that you are taking on this big responsibility, and many will want you to do well. You may remind them of a niece, a son, a hardworking kid from the neighborhood who went to law school. So if you do make a mistake or get beat up a little by the judge, just be gracious about it and move on (e.g., "I apologize for the leading questions, your honor; I will try to do better.") Focus on building the jury's trust. Try to ask questions that elicit the information you would want to know if you were sitting in that jury box. Be careful not to stretch the facts or your arguments too far, or you may lose credibility. Cross adverse witnesses on points that force the jury to think about whether the witness is overreaching, is too biased or did a sloppy analysis. If you earn the jury's trust during trial, and give the jurors reason to question the other side's case, you will have positioned your client for a win.

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

A: We tried a case a few years back against Fish & Richardson PC and Baker Botts LLP. Tommy Jacks of F&R's Austin office was the lead. The dispute involved a complicated patent license agreement, and his client was potentially on the hook for a big chunk of unpaid license fees. Tommy came into the case fairly late, and had to do a lot of coming up to speed in a short amount of time. You wouldn't know it from his performance in the courtroom, though. He was well-prepared every day and was very smooth putting on his witnesses. His cross-exams of our witnesses were typically short, but effective. You could see that he had developed a few key themes and was constantly reinforcing those themes at every opportunity. Tommy kept it simple and related well to the jury. Although our client prevailed, we did not get all the damages requested. I believe Tommy's strategy on the damages issues had a lot to do with that. He was fun to watch, and I learned from the experience.

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