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# Q&A With Goldman Ismail's Andy Goldman

*Law360, New York (April 29, 2013, 12:34 PM ET)* -- Andy Goldman is a partner at Goldman Ismail Tomaselli Brennan & Baum LLP in Chicago. He has spent most of his career defending large corporations in products liability litigation and other complex commercial matters. Goldman has experience trying large, complex commercial litigation cases before both judges and juries.

**Q: What is the most challenging case you have worked on and what made it challenging?**

A: The most challenging case involved plaintiffs who had hemophilia, were treated for years with my client's factor concentrate medication and subsequently developed HIV, AIDS or died. The product at issue was manufactured from a pool of plasma from thousands of paid donors. Unbeknownst to my client and other manufacturers of factor concentrate, some of the pooled plasma became contaminated with HIV in the 1970s to early 1980s. In fact, the subsequent studies showed that almost half of the hemophilia population (10,000 out of 20,000) developed HIV and/or AIDS as a result of using factor concentrate. Some included children, such as one 10-year-old boy whose parents sued my client for negligence and wrongful death.

The trial was challenging on a number of levels. It was emotionally challenging, given the tragedy experienced by the parents, not to mention the tears shed by jurors who watched a day-in-the-life video of the dying boy. Legally, the cases were challenging because the client had no general or specific causation defense, and the product at issue did not contain a warning about HIV or AIDS during the relevant time period. Our defense turned on the reality that our client never saw this coming, i.e., the risk of HIV/AIDS was not reasonably foreseeable. In fact, at the time that all three plaintiffs developed HIV, no one in the world had linked AIDS to the blood supply, and the HIV virus had not even been discovered.

The jury ultimately rendered a defense verdict in all three cases notwithstanding the empathy that they and everyone else in the courtroom must have felt for the plaintiffs themselves.

**Q: What aspects of your practice area are in need of reform and why?**

A: One area in need of reform relates to lawsuits filed by state attorneys general who seek to impose civil penalties on pharmaceutical manufacturers for alleged violations of their state's Consumer Protection Act or Medicaid fraud laws. Typically, these state AGs retain outside counsel who are paid on a contingency-fee basis — a practice that, in of itself, is improper for the same reason that it is unethical for prosecutors to be paid based on the number of convictions they obtain. The marketing of prescription drugs in the U.S. is governed by federal regulations and is overseen by the U.S. Food and Drug Administration. In fact, manufacturers must submit to the FDA every promotional sales aid and every direct-to-consumer advertisement.

Despite the fact that the FDA has an entire division devoted to overseeing the promotion and marketing of prescription drugs, state governments and their contingency fee counsel are now attempting to use state statutory schemes such as the Consumer Protection Act to impose penalties for allegedly false and misleading marketing of prescription drugs. In the last few years, pharmaceutical companies have been hit with judgments that have reached nine or even 10 figures.

**Q: What is an important issue or case relevant to your practice area and why?**

A: In April 2012, an Arkansas judge fined Johnson & Johnson and its subsidiary $1.2 billion ($5,000 for each prescription) under that state's Consumer Protection Act for allegedly false and misleading marketing of Risperdal. The subsidiary has lost other Risperdal AG cases — $327 million in South Carolina and $258 million in Louisiana — and it paid $158 million to settle a case brought by the Texas AG.

The fines in these types of cases are often based on the distribution of package inserts that had been approved by the FDA or on a single allegedly false or misleading letter that is then distributed to thousands of health care providers in the state. Put differently, pharmaceutical companies are now being penalized hundreds of millions of dollars for distributing FDA-approved labeling in a state even though federal law requires the use of such labeling throughout the U.S., and in some instances, requires companies to distribute thousands of letters to health care provider describing new labeling approved by the FDA.

Fortunately, J&J has appealed the Risperdal verdicts, and hopefully, the South Carolina and Louisiana Supreme Courts will rein in their state AGs' misguided attempt to regulate the marketing of prescription drugs via imposition of civil penalties under Consumer Protection Act.

**Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.**

A: Chilton Varner (a partner at King & Spalding in Atlanta), whom I tried a case with last year in federal court in New York, impressed me in numerous ways, both before and during the trial. She is incredibly prepared, very organized and exudes credibility.

Chilton adheres to the principle of silent advocacy, which is also the name of a book she co-authored several years ago. Chilton acts as if the judge and jury are watching every move she makes. Every expression she makes, every reaction she shows and every word she utters is designed to persuade the jury that they can trust her. Chilton always treats the judge, opposing counsel, witnesses and even the court reporter professionally and with respect — which was just one of the many reasons our jury came to respect Chilton and render a verdict in our client's favor.

**Q: What is a mistake you made early in your career and what did you learn from it?**

A: I learned early in my career the importance of not gilding the lily by asking one too many questions. The witness in one of my cases was a treating physician who had prescribed the medication that my client manufactured. The key question in most negligence cases involving prescription drugs is whether the doctor would have prescribed the medication at issue even if the drug manufacturer had provided a different warning about the side effect that the plaintiff ultimately experienced.

In one of my first depositions, opposing counsel started the deposition by asking the doctor a number of questions about the plaintiff's medical history, use of the medication at issue and the doctor's knowledge of the risks and benefits of the medication. In the final portion of that examination, the doctor refused to speculate as to whether he would have treated the plaintiff's medical condition any differently if he had known more information about the drug's safety profile. In other words, plaintiff failed to establish the necessary causal link between the manufacturer's allegedly inadequate warning and the doctor's decision to prescribe the medication.

Rather than being satisfied with that testimony, in my examination, I decided to ask one final question: "Is it fair to say that you stand by your prescribing decision even based on everything you know today about the medication's safety profile?" The doctor surprised me by testifying: "No, that is not fair to say. Had I known that my patient would have suffered the side effect, I would not have prescribed the medicine."

Even though I objected to the answer as nonresponsive, I had difficulty rehabilitating the witness or even getting him back to where he was at the end of opposing counsel's examination. As I have done in subsequent cases, I would have been much better off not asking any questions at all.

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