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Q&A With Goldman Ismail's Shayna Cook

Law360, New York (April 22, 2013, 2:05 PM ET) -- Shayna Cook is a trial lawyer and partner at Goldman Ismail Tomaselli Brennan & Baum LLP. Cook represents clients in commercial litigation and has served as national trial counsel in multidistrict litigation involving pharmaceutical product liability.

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

A: The most challenging series of cases I've had were the Vioxx personal injury trials in 2005 and 2006. What made them challenging was the grueling trial schedule, with trials set back to back in federal court and in multiple state court jurisdictions as well. As soon as our team came home from one trial, we immediately started gearing up for the next one. Work-life balance was a pipe dream — I even canceled my honeymoon for one of the trials.

What I gained was a tremendous amount of trial experience in a short period of time and a lasting camaraderie with my trial teammates.

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

A: I would like to see more courts excluding plaintiffs' experts who give opinions on company conduct. These "omnibus" experts, who purport to have expertise in human factors or U.S. Food and Drug Administration regulations, give nearly identical opinions in almost every pharmaceutical products liability case.

They typically review company employees' emails and other internal company documents (generally, only a cherry-picked set presented to them by plaintiffs' lawyers) and conclude that the company was aware of certain risks of its medicine and should have informed patients (or doctors or the FDA or all of the above) about the risks. Trying to get a straight answer out of these professional witnesses in a deposition is virtually impossible and exhausting.

More importantly, as several courts have held, this testimony is improper under various legal precedents (Daubert and Buckman, among others) and invades the province of the jury. Jurors are perfectly capable of reviewing company documents — as properly presented by a fact witness, not a paid expert — and coming to their own conclusions about the company's knowledge of the risks and adequacy of its warnings. Allowing plaintiffs to present this argument under the guise of "expert" testimony is arguably more prejudicial than allowing them to make a second opening statement.

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

A: In the pharmaceutical and medical device world, the various preemption doctrines are evolving in interesting ways. One area of case law I've been watching closely is the Wyeth v. Levine "clear evidence" progeny. The U.S. Supreme Court's 2009 decision in Levine that federal law does not preempt state law failure-to-warn claims kept the preemption defense alive in cases where there is "clear evidence that the FDA would not have approved" the warning the plaintiff advocates.

Since then, only a few courts have considered this question, and even fewer have found it applicable. Under the right circumstances, this could be a strong defense for pharmaceutical manufacturers in failure-to-warn cases.

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

A: Marla Persky, the vice president and general counsel of Boehringer Ingelheim Corporation, is my heroine and mentor. As the top lawyer there and previously at Baxter International Inc., Marla has spent years championing female trial lawyers like myself. She encouraged women to "lean in" long before the concept became popular, and she gave them opportunities to sit at the table. She has also implemented many business innovations, including alternative-fee arrangements.

She has taught me a lot about managing a business as there is no strategic decision she has not encountered in her career. Not only did Marla pave the path to success for the next generation of female lawyers, but she continually resurfaced the path to ensure its accessibility by taking the time to mentor younger lawyers — even those outside her company.

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

A: I learned the importance of keeping a poker face in the courtroom during the first week of my clerkship for U.S. District Judge Sam Sparks in Austin, Texas. I was observing a cross-examination in a patent infringement trial from my customary spot, right in front of the bench. Suddenly, the attorney who was examining the witness requested a bench conference out of my presence.

A couple of minutes later, Judge Sparks wrote me a note: "Watch your facial expressions. Other people are." Apparently, I had been openly displaying my feelings about the examination. I was mortified. Fortunately, Judge Sparks, who is well known for his sense of humor, thought it was hilarious and used it as a teaching moment.

Now, I force myself to be stone-faced in front of judges and jurors and teach younger attorneys to do the same. Maintaining one's composure is critical to establishing credibility with judges and jurors. But it's also not easy — at my most recent trial, something made me laugh so hard, I had to stick my head under counsel table and pretend to look for something in my briefcase!

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