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Q&A With Hughes Hubbard's Diane Lifton

Law360, New York (March 25, 2013, 1:13 PM ET) -- Diane E. Lifton is co-chairwoman of Hughes Hubbard & Reed LLP's product liability group and a partner in the litigation department. Her practice focuses on the coordination and trial of pharmaceutical, medical device and toxic commercial litigation.

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

A: I tried a multiweek drug product liability case with a terrific colleague from another firm. It was the judge's first time trying a case involving this particular drug, and it was the first time this type of claimed injury from this drug was being tried by any court. My colleague and I spent what seemed like a third or more of each day at side bar arguing evidentiary issues. Instead of each day presenting a new challenge or two, with the parties' experts, each witness and at times every new question, every piece of data and each document presented new challenges.

There is nothing more satisfying than arguing law and facts during trial, especially with novel areas of science. Unfortunately, the state's evidentiary rules made each one of those arguments an uphill battle. I thought I had experienced the most impassioned battles over evidence at that product liability trial, until I tried a child custody case.

It took us over a year to put on the evidence, two or three hours at a time, because the family court was too overbooked to try any one case at a time to conclusion. There, too, I argued many challenging evidentiary issues, with a thoughtful judge but at times with no clear precedent, and with entirely different stakes — the future of a child.

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

A: New Jersey has a product liability statute that remains reasonably favorable for manufacturers, particularly for pharmaceutical companies. Nonetheless, thousands of new product liability/personal injury cases are filed each year in New Jersey, including many by non-New Jersey residents claims. In addition to the perception that cases can be aggregated with ease, plaintiffs seek out New Jersey courts because New Jersey's evidentiary rules on the admissibility of expert testimony continue to lag behind the federal rules.

As a result, plaintiffs can survive summary judgment in New Jersey state courts on the basis of the type of unreliable expert evidence that is routinely excluded in federal court. Efforts continue to encourage the New Jersey Supreme Court's Rules of Evidence Committee to amend Rules 104 and 702.

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

A: Dobbs v. Wyeth, currently on appeal before the 10th Circuit, involves the application of federal preemption to a state law failure-to-warn claim involving the prescription drug Effexor. In Wyeth v. Levine, the U.S. Supreme Court stated that there has to be clear evidence that the U.S. Food and Drug Administration would have rejected the plaintiff's proposed warning in order for preemption to apply.

The trial court in Dobbs granted summary judgment in Wyeth's favor, finding that the detailed regulatory and factual record in that case contained clear evidence that the FDA would have rejected plaintiff's proposed warning and that preemption therefore applied. Although a Tenth Circuit affirmance would be a step toward the reduction of state law failure-to-warn claims for this highly regulated industry, we have been working toward its elimination altogether for more than a decade.

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

A: Different people have impressed me for different reasons.

Debra Pole, a partner at Sidley Austin, was the lead trial lawyer on the first medical device trial I was assigned to in 1998. Her work ethic was extraordinary. She put everything she had into the trial of that case, from developing strategy to preparing her opening and closing, and ultimately, she successfully tried the case to a defense verdict. Among other important lessons, she taught me that there is absolutely nothing more important than preparation.

Tom Sabatino, the general counsel of Walgreens, Marla Persky, general counsel for Boehringer Ingelheim, and Linda Friedman, general counsel of Astellas are incredibly supportive of women and diverse attorneys — both in-house and external counsel. Each values diversity of viewpoints from their outside counsel and made clear it was absolutely critical both to their strategic dialogue and to their litigation success. They are also great mentors, and from my perspective, there are few things more important than taking responsibility for the growth and advancement of women and diversity in the legal profession.

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

A: I learned early on — from my very first typo in a draft letter — how important it is for a lawyer to take ownership of his or her work. As a lawyer, as with any professional, the buck always stops with you and your own performance, whether you are a first-year researching and drafting a brief or a senior attorney getting ready for trial.

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