

5 Mistakes Young Product Liability Attorneys Make

By **Emily Field**

Law360, New York (May 23, 2016, 6:34 PM ET) -- Attorneys fresh from law school can easily get swamped by the flood of facts and scientific data that often comes with product liability cases. These rookie mistakes can lose a case for a client that might have seemed like a slam dunk.

Here, attorneys share the most common blunders they've seen newly minted product liability attorneys make, from getting major facts wrong to going overboard in a deposition.

Failing to Know the Facts

Product liability cases can be extremely heavy on facts and dense with data, attorneys said. But no matter how daunting the reams of information that accompany cases such as pharmaceutical or medical device suits, young attorneys in particular need to know the facts forward and backward.

"It is a common but extraordinarily serious mistake for product liability lawyers to try to litigate a case without fully mastering the science," said Paul Boehm of Williams & Connolly LLP.

Understanding the science is the only way to properly examine witnesses and build a narrative that a judge and a jury can understand, Boehm said.

Knowing the product involved is also a stumbling block. "I think a lot of younger attorneys tend to jump right into their assignment without fully learning about the product's uses and history and the information provided with the product," said Doug Robinson of Shook Hardy & Bacon LLP.

Often a younger attorney will go to a superior to discuss a new case but then get tripped up over a basic question about the product, Robinson said.

"It just dawns on the younger attorney that they don't know exactly what the product is," Robinson said.

Associates who take pains to learn the details of the case — all the specifics of the incident, the product, the plaintiff and other key players — will set themselves apart from their peers and can make a difference especially when taking discovery against the opposition, he said.

Taking Unusable Depositions

Overeager young attorneys who go on the attack while deposing witnesses end up shooting themselves

in the foot, said Donald Migliori of Motley Rice LLC.

“It usually creates a deposition transcript that’s not usable because it’s just argumentative,” Migliori said.

Young associates sent to depose fact witnesses also tend to stick with their outlines instead of really listening to the witness’s answers and following up with more direct questions, Robinson said.

“Sometimes with fact-witness depositions, young associates fail to appreciate their importance,” Robinson said. “A witness will often answer but not give you a complete or give final answer such that they may have some wiggle room at trial.”

Young product liability attorneys should be mindful to keep their questioning of the opposition witnesses tailored to the story or theme they are building to present at trial, Migliori said.

“Don’t allow experts and witnesses on the other side to undo what you are trying to build,” he said. “I see a lot of young lawyers give experts for the defense a platform.”

Taking a Short-Term View

Product liability cases often involve national manufacturers and widely distributed products, like cars of various makes and models, but product liability attorneys who are just starting out often fail to take a long view, more seasoned counsel said.

“If you have a children’s toy or bike helmet, there are millions out there, and there’s the potential for litigation on more than one front,” said Douglas Bohn of Cullen & Dykman LLP.

Younger attorneys also need to realize that positions and arguments made in a case now are likely to pop up again in the future if other cases arise over the same product, Bohn said.

A product might also have a history of similar claims, which can be a significant part of discovery process, Bohn noted.

“The proper framing of discovery for prior claims that are to be disclosed and ultimately admitted is often a very important part of a product liability case, and that may not be something that a young attorney may be as cognizant of as they may need to be,” Bohn said.

Overlooking Evidence

When collecting evidence, attorneys still fresh from law school tend to not think about the user, such as whether they had a history of using similar products or reading the owner’s manual, Robinson noted.

“Oftentimes warnings claims are the easiest claims to get to the jury and the easiest claim for the jury to hang their hat on in terms reaching a verdict, because typically the plaintiff will say, ‘If I would have known something different, I would have taken a different action,’” Robinson said.

Evidence that would rebut that, which could be gathered by talking to other witnesses or asking about that type of information in depositions, is often overlooked, he said.

Young attorneys also fail to appreciate the importance of damages evidence and how that can affect the credibility of either side, Robinson said.

“For plaintiffs, if they stretch for damages, that often can be used against them,” he said. “For the defense, if they strongly rebut what is a clear injury or try to take or ignore damages evidence, then often that can have a negative effect on liability.”

Shortchanging Their Home Lives

Product liability mass tort is a travel-heavy area of law that isn’t especially conducive to family life, especially when doing trial work, Migliori said.

“The biggest mistake that lawyers make in this area is that they live two lives separately — they separate their work life and home life that so that they become competing lives,” Migliori said. “I have found the only way be a mass tort lawyer is if you’re truly able to bring family into your work life as much as you can and show your family what it is you’re doing.”

Migliori, who has five children at home including a 5-month-old baby, said bringing family along on trips, if possible, and explaining your work to them are ways to show why you’re working so hard.

And it’s essential to stay in shape and not to let yourself get run down and exhausted, Migliori said.

“Part of that is living healthy day to day,” he said. “You’ve got to eat well, you’ve got to rest, you’ve got to get yourself to a gym, build up that kind of strength so that when you are home, you can be home and be there for your family.”

--Editing by Brian Baresch and Kat Laskowski.
