

longer exists or had little or no product liability insurance. And if the former company has declared bankruptcy, an automatic stay of product liability lawsuits against it wouldn't extend to claims made against its individual former employees, officers and directors.

Plaintiffs will probably continue to attempt to blur the contours of established principles of “enterprise liability” inherent in the law of *product* liability with “simple negligence” principles. After all, there is a general rule that one remains liable for their own negligence, even though it may be imputed to their employer or principal. However, it is the author’s opinion that where the individual defendants/employees are not separate “market participants” and have not acted fraudulently or separately interacted with

a plaintiff or their medical provider so as to assume some separate, individualized duty of care, they should ultimately not be subject to individual “product” liability.

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Important Trial Roles Any Young Lawyer Can Fulfill

By Kali Enyeart Book and Stanley E. Blackmon



It is undisputed that there has been a dramatic decline in the number of trials over the past century. This reality has left many litigators—especially young

ones—struggling to find trial experience. Pro bono work is a great option for young lawyers to gain experience. Often overlooked, however, are the many trial opportunities within an attorney’s own firm and practice. While many of these opportunities are not first-chair ones (or even seats at counsel table), they provide invaluable trial experience on which a young litigator can build as they work their way towards arguing to the jury.

This article explores a few of the important roles that junior lawyers can fulfill on a trial team when they have no or limited trial experience.

Trial Roles Are Earned Long Before Trial

It may be a year (or more) before a case goes to trial. Tedious and seemingly miniscule tasks can often lead to important trial roles. For instance, many judges issue demanding Trial Management Orders early on in a case. Reviewing those orders, understanding them, and creating a checklist of the tasks and deadlines contained in those orders allows junior attorneys to become effective, and indispensable, managers of the trial team’s pretrial filings. It also gives those junior attorneys advanced notice of the

pretrial filings required, giving them ample time to prepare and potentially volunteer to complete those tasks.

Discovery also presents many opportunities to develop a trial role—especially depositions. Even if the young litigator did not take the deposition, they should still volunteer to review the transcript and, when the time comes, handle deposition designations. Deposition designations give attorneys with limited experience the opportunity not only to think strategically about the evidence that should be presented at trial, but they also provide a unique opportunity to hone negotiation and other important trial skills. After a party submits their deposition designations, the opposing party provides their objections and counter-designations. The initial party then determines any objections to those counter-designations and potentially designates additional testimony. After this process, the parties typically meet and confer and negotiate their designations and objections. Very few judges tolerate extensive disputes over deposition designations. It is thus important for the parties to negotiate and resolve many of their differences. Before or—most often—during trial, judges will hear argument on any disputed designations. If the junior attorney has reviewed the transcript, designated the testimony, and negotiated the objections, they have the background needed to handle these arguments. Additionally, if the designations are read at trial, the junior attorney should volunteer to play the witness. Reading a transcript seems easy...until you do it in front of a jury! Speaking in court

and in front of a jury—even if not your own words—is an important skill that any young litigator needs to develop.

Knowing a case's documents may also lead to important trial roles. Documents are often the lifeblood of a case. A thorough understanding of the case's documents is critical when developing the case's exhibit list, determining potential motions *in limine*, preparing company and expert witnesses, and drafting trial outlines. Knowing the case's documents gives any attorney the knowledge and ability required to fulfill these trial roles and more. All of the hours you spent scouring over a plaintiff's medical records will be well worth it when the wary senior partner asks you one late trial night to refine the cross-examination outline for a damage witness—or, even better, tells you to go do the cross!

I Got This

Any litigator will tell you that the preparation efforts leading up to the pretrial conference are just as important as those leading up to the first day of trial. Making sure proposed voir dire questions have been submitted, stipulations have been negotiated, and that the correct number of copies of exhibits in the right binders (D-Ring? O-Ring? There's a difference?) have been sent to the court are all important trial tasks. As discussed above, pretrial filings present ample opportunity for newbie attorneys. Young lawyers can draft routine motions *in limine*, helpful pocket briefs, sections of trial briefs, and subpoenas for fact witnesses. They can also volunteer to draft and negotiate joint pretrial statements and other joint filings. The young attorney who drafted the routine motion *in limine* should not shy away from volunteering to negotiate it and arguing it if it cannot be resolved. Committing to seeing a filing through and not just forgetting about it after it is filed can earn you a seat at counsel table for at least the pretrial conference. And preparation is key—all manners of issues can arise at the pretrial conference. Being the associate who expects the unexpected, and who ensures that the team is ready to handle those unexpected issues, doesn't go unnoticed.

Fight the Good (and Oftentimes Late at Night) Pre-Trial Fights

It is amazing how much the parties must speak to one another before trial. Stipulations need to be negotiated. Joint exhibits need to be selected. Jury instructions must be discussed. These types of negotiations are usually completed in the weeks leading up to trial. They are typically done over the phone and oftentimes require more than

one phone call. Taking charge of these tasks allows a junior attorney to practice core litigation skills in a relaxed setting. It also puts them in a good position to advocate for arguing any remaining disputes in front of the judge.

Be a Legal Egghead

Anyone who went to law school knows how to research and read a case. While law school does not teach young lawyers how to try a case, it does teach them how to read and understand the law. Any new lawyer is well-equipped to help in drafting proposed jury instructions. Many courts require use of the state's pattern jury instructions. However, in almost every case, some nuanced issue arises that requires creating a well-researched and supported non-pattern instruction. Young attorneys can volunteer to draft proposed jury instructions. Taking the time and effort to understand a case's proposed instructions and the legal basis for them arms the junior lawyer not only with the knowledge to handle negotiating the proposed instructions with opposing counsel, but also to take—or at least share in—the responsibility for the charging conference.

Know Your Jury (and Their Instas)

Almost every new attorney can use their social media skills to fulfill an important trial role. If a case is in a jurisdiction where juror information is available before jury selection, the junior attorney should take charge of researching potential jurors and/or working with jury consultants. If the case's jurisdiction does not provide this information beforehand, a junior attorney working quickly to craft an easy-to-use chart that captures the core biographical information disclosed by potential jurors will be much appreciated by the trial attorneys when they must make quick, on-the-spot decisions about potential jurors.

Can I Help?

It really takes a village to try a case. As trial nears, junior lawyers should offer to help, over and over and over. Volunteering to do late night research for a trial your partner is trying on the opposite coast will be appreciated. Confirming a key fact witness was properly subpoenaed and following up to make sure that witness appears at trial will be noted. If you are enthusiastic and do a good job executing whatever trial task you are handed, the partner

will remember and likely will look to you to fill a bigger role when the next trial rolls around.

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