

Five Tips For Preparing Sales Reps For Trial Examination

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Ask anyone seasoned in the defense of drug and device companies what types of company witnesses present the greatest challenges and the answer is often the same: marketing witnesses. And within that universe, none represent larger obstacles than those posed by the sales representative.

The sales rep is the one person in the trenches every day detailing the clinical advantages offered by his or her product/device/therapy to physicians. That person, then, is often the singular nexus between the company and the physician, and offers seasoned plaintiffs' counsel an opportunity to exploit their jury-friendly themes.

Foremost on this list of themes is the time-honored plaintiff's saw: "This company puts profits over safety." This argument, taught at Plaintiffs Law 101, is laid out on the first page of their playbook. And the last page. And every page in between. Unfortunately these days plaintiffs' lawyers don't need Hollywood screenwriters to come up with their villains — it was handed to them on a silver platter with one Martin Shkreli, the one-time pharmaceutical executive who drew scrutiny and scorn for raising the price of a life-saving drug by over 4,000 percent. To solidify his worst-person status, he was later indicted on charges of federal securities fraud and then ordered to testify before Congress, where he invoked his right not to testify.

And the politicians piled on.

Of course, this is not my reality, in my role as a pharmaceutical company defense attorney, or perhaps yours either. Nevertheless, this is the perception we must be prepared for.

What follows are what I would consider "best practices" for preparing the sales rep for examination at trial.

First, know the rep documents. Bear with me for a brief moment while I impersonate Captain Obvious. In a mass tort with millions of documents, there may be only a handful associated with this specific drug rep, and an even smaller number between this rep and the particular physician at issue. This is an obvious starter. Know the paper trail for this physician because that's likely where the adversary will begin as well.

Second, plan the direct exam. Sales reps are typically millennials, which means they are often about to change jobs or perhaps have already left employment with the client. Get that trial-ready direct exam in



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the can now. Your trial counsel will thank you years down the road. Also, once you have assembled the outline for your direct, that outline will help you organize the approach to the cross exam.

Third, lay out the plaintiff's road map. Reps are generally earnest, smart young men and women who "get it." Yet my experience is that many have limited understanding of how easy it is for plaintiffs' counsel to drive wedges between the company and the physician. I've learned it's useful to take time to lay out the theories, and identify the kernel of truth in the plaintiff's themes so that they have a keen understanding of the challenges ahead. This is the opportunity to embrace the facts of the device or drug, and the undeniable realities that often shape what is frequently a part of mass tort.

Fourth, go back to the sales training. The days of the drug and device Wild Wild West went the way of the land line. This was an embarrassment of riches for the plaintiff's bar. No more. With the advent of corporate compliance officers, anti-kickback rules and the development of ethical codes for physician interactions, these have now transformed the ways of doing business at every level. Reps are trained and reminded endlessly of the prohibitions of marketing, sales and sticking to the label. This is a useful safe harbor for all company witnesses.

Finally, safety sells. Doctors are first and foremost patient advocates. This is especially true now where there is considerable competition among physicians for patient referrals. Add to this the reality that physicians have multiple sources of information and likely no longer rely on the sales rep exclusively. Multiple physician surveys have confirmed that physicians readily use targeted web sites for data, including Pubmed, clinical practice guidelines, as well as data provided by their own professional organizations. Decision-making is data-driven, and physicians have the capability to go beyond anything provided by the drug or device company to help shape their risk/benefit decisions.

Likewise, patients are empowered. Today, over three quarters of Americans use the internet to research health topics; with the proliferation of smartphones, the searches may have taken place before they even left the doctor's office. This supplements the informed consent to help drive science-based patient decisions.

In short, drug and device reps will always present challenges for defense attorneys at trial. Identifying at the outset both the generic and case-specific obstacles will help to ensure a successful defense of your marketing witnesses.

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