The Company’s Front Line:
An Overview of Preparing Pharmaceutical and Medical Device Sales Representatives for a Deposition

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I. Introduction

Sales representatives in a pharmaceutical or medical device product liability case can be “make or break” witnesses; they are on the company’s “front line” with respect to supplying product information, as well as fielding product-related questions from physicians and their staffs. Given this role, they are in a unique position to strengthen or weaken the company’s defense—or in the worst case scenario, to give plaintiffs’ counsel new liability grounds. Because these depositions are high-stakes events for the defense, savvy plaintiffs’ lawyers are likely to target sales representatives for depositions as early as possible. Careful and thorough preparation of these witnesses is absolutely critical.

Many young lawyers involved in drug and medical device litigation will have the opportunity to work with and/or prepare sales representatives for depositions. This paper is designed to be a “first-step” guide to preparing for and defending a sales representative deposition. In it, we will cover: (1) conflict and privilege analysis; (2) initial analysis of documents and data; (3) preparing for and conducting meetings with the sales representative; and, (4) strategies for the deposition itself and avoiding pitfalls.

II. Preparing the Sales Representative for a Deposition

In the majority of prescription pharma and device product liability cases, the plaintiff’s focus is on the manufacturer’s allegedly inadequate warnings about risk. Most jurisdictions apply the learned intermediary doctrine whereby the company’s duty is to warn the prescribing physician, not the patient. E.g., Centocor, Inc. v. Hamilton, 372 S.W.3d 140 (Tex. 2012) (adopting the doctrine in Texas and observing: “Our sister states have overwhelmingly adopted the learned intermediary doctrine in this context[.]”).

Under the learned intermediary doctrine, the testimony of the prescribing physician is crucial. For example, if the physician testifies he or she was aware of the risk at issue and prescribed the drug or device despite that risk, the company may be entitled to summary judgment on the plaintiff’s warnings claims. And since sales representatives may have face-to-face interaction with prescribing healthcare providers, their testimony takes on special significance.

A. Why Are Sales Representatives Enticing Witnesses for Plaintiffs?

Sales representatives can play an important role in a company’s efforts to educate medical professionals about its products. But their job is also to promote sales of the products they detail—a motivation that any competent plaintiff’s lawyer will highlight and capitalize on. Sales representatives are likely to have relevant information about how the manufacturer wants specific products promoted/marketed, how that marketing changed over time, and what strategies were employed by the sales force to assist in meeting the manufacturer’s marketing goals. These areas can be a gold mine of helpful testimony for experienced plaintiff lawyers, even when the company’s marketing was legal and appropriate.

In this vein, below are some examples of how plaintiffs’ counsel frequently tries to obtain admissions that a sales representative “over-promoted” a drug or device:

● overstating the product’s benefits;
● downplaying or minimizing the risks;
● failing to mention the product’s risks to the doctor;
● promoting the product for an off-label use; or,
● failing to keep the doctor informed of label changes or other changes in scientific knowledge.

Many of the same qualities that make a sales representative good at his or her job can be challenging for the representative as a witness in a deposition. Sales representatives are often natural “pleasers”—they pride themselves on being able to establish a connection in conversations. Unfortunately, that characteristic often goes hand-in-hand with a tendency to be agreeable and/or answer questions—even when the “conversation” is with plaintiffs’ counsel. Accordingly, they are at risk of finding themselves being led down a dangerous path of admissions inconsistent with defense themes. And like almost all witnesses, they want to look smart. They thus may have a natural aversion to confessing ignorance on any subject—even if it means speculating or otherwise going out on a limb. A sales person’s natural self-confidence and gregariousness often heightens this predilection.

Finally, sales representatives often keep personalized notes of their activities or sales calls. In fact, their employers may require it, though it is becoming less common to see personalized call notes. These notes may contain shorthand, ill-advised attempts at humor, or other language to which the plaintiff’s attorney will try to suggest inappropriate marketing or give a sinister interpretation.

B. Conflict and Privilege Analysis

The very first step in planning for sales representative depositions is a thorough analysis of potential conflicts and the scope of the attorney-client privilege under the applicable state law. Conflicts are more likely to arise when counsel for the company also represents non-party former employees for purposes of their depositions. However, conflicts can also occur when dealing with current employees. A full discussion of this complex subject, including the enforceability of conflict waivers and the advisability of retaining separate counsel, is beyond the scope of this paper. The point here is that it is critical to think about conflict issues sooner rather than later.

Potential conflicts can arise in many situations. For example, the sales representative may admit to improper marketing activity, such as off-label promotion. That could be grounds for termination of a current employee. The situation becomes even more complicated if the representative claims the company condoned or even encouraged such activity. Moreover, the facts giving rise to potential conflicts may not become apparent to counsel until detailed discussions with the representative occur, including during deposition preparation meetings.

It may thus be prudent and necessary to prepare a conflict waiver for the sales representative to sign before (or at the time of) engaging in discussions with the representative regarding his or her employment. These types of waivers are common, but state law governing when and whether they are permissible and enforceable can vary considerably. Some states permit so-called “advance” conflict waivers; some may not.

Attorneys should also consult the applicable state law on attorney-client privilege in the context of representing former or current sales representatives. For current employees, some states might apply the “control group” test while others might apply a variation of the “subject matter test” in determining whether privilege applies and what communications are covered. In the context of a former sales representative, if counsel ultimately decides not to represent the former employee, state laws vary on whether privilege applies to prior conversations with the sales representative or notes taken by the attorney during such conversations.
In brief, the issue of potential conflicts, waivers and implications of attorney-client privilege present complex issues that must be examined on a case-by-case basis. And those issues need to be hashed out before counsel for the company undertakes representation of sales representatives.

C. Relevant Documents and the Virtual Notebook

It is critical in preparing a sales representative for deposition that you assess all available documents and data. At the outset of this process, always prepare and update a detailed “chain of custody” with respect to these documents. Claims of spoliation may well arise, particularly if a sales representative kept (or didn't keep) paper records at home. Relevant documents and data for a sales representative deposition can take many forms. Some examples are listed below:

1. Call Notes
2. Custodial File
3. Personnel/HR File if available (and necessary to produce)
4. Actual promotional pieces, leave behinds, and scientific literature
5. Prescriber/Surgeon Testimony (if any)

As you are gathering the relevant universe of documents concerning a sales representative, one suggestion is to create a “virtual notebook” containing the documents. This is intended to be one-stop shopping for anyone on your team who wants to learn everything there is to know about your sales rep. Documents to consider including in the “virtual notebook” include:

- Call Notes (and related analysis) – consider reviewing the call notes, noting any personalized call notes, particularly with respect to any comments that might be attractive to a plaintiff’s attorney. Also review with an eye towards how many calls a sales representative made on a particular doctor and during what time frame the calls were made. Time frame of calls can be relevant when there are label changes or relevant clinical studies that discuss adverse events potentially associated with your product
- Custodial file analysis
- Personnel file analysis
- Information and documentation regarding relevant prescribers/surgeons
- Information and documentation regarding your sales representative's manager, territory, fellow representatives in the same (or nearby) territory, and the product portfolio your sales representative was responsible for
- Overview and analysis of the sales and marketing pieces provided to sales force for use in promotion of the product
- Overview of company policies for the sales force for the period during which the product was promoted
- Other significant documents

As the case progresses, you are likely to have multiple conversations with a sales representative. It is advisable to prepare a detailed memorandum of every single contact and interaction with the representative. These memoranda should include detail regarding each conversation with the sales representative, especially in the case of a former sales representative who was employed years ago. Memory of relevant facts, company polices, prescribing physicians and other company employees can change over the course of contact with the
sales representative therefore detailed notes will become a helpful reference. This notebook will be invaluable for deposition preparation.

D. First Contact with a Sales Representative

The first conversation, in former employee situations, can be critical to establishing a relationship and ensuring cooperation throughout the litigation. It may be advisable to have in-house counsel or a company representative reach out initially or be present on the initial call. If the litigation involves a large number of former sales representatives, and it is not feasible to have a company contact on each call, make sure you tell the individual that he or she is welcome to call the former employer at any time for more information. Consider having an in-house attorney name and phone number to provide to the sales representatives up-front. If, after conducting the thorough analysis recommended above, counsel for the company will be offering to also represent the former employee, make very clear to the representative that he or she has the option to hire separate counsel. Depending on the number of sales representatives involved in the litigation, consider developing a basic script that can be used by all attorneys when contacting sales representatives to ensure consistency with each initial call.

During the initial call, it is important to obtain as much contact information as possible, given that the litigation may last years and people employed in sales tend to move around. Attorneys should provide sales representatives a general overview of the litigation and why they are being contacted. Many sales representatives will want to know what the likelihood of a deposition is and, potentially, whether they will be compensated (in context of former employees). Discuss these issues with your client in advance of the initial call and develop a strategy on how to respond to these questions.

E. Deposition Preparation Meetings

1. What Documents to Discuss?

The attorney conducting the deposition preparation session(s) must have a detailed understanding of the product and product-timeline from launch to present. This should include all changes to the package insert, advertising, and promotional material that occurred during the time period the sales representative promoted the product.

Be particularly mindful of any documents authored by your sales representative that might be attractive to plaintiffs’ counsel. Identify all significant documents from a sales representative’s custodial files and consider looking at the files (if available) related to the sales representative’s manager(s) or co-employees. Significant documents can involve comments on off-label promotion, the adverse event(s) at issue, the company or other sales representatives/managers, and any indication that a sales representative engaged a physician outside of the office. Be aware of, and familiar with, any guidelines related to interactions with healthcare professionals. Many pharmaceutical and medical device manufacturers follow or adopt the guidelines from The Pharmaceutical Research and Manufacturers of America (PhRMA) Code on Interactions with Healthcare Professionals, which outlines how sales representatives and others involved in marketing pharmaceuticals should interact with health care professionals.

It is especially important to identify documents describing guidelines/limitations on field promotion and field activity and prepare your witness for the questions he or she likely will receive about compliance with these policies. For example, there are frequently guidelines on whether study reprints could be distributed and/or discussed. Obviously, compliance with these rules can be tricky, and it is especially important that the witness give specific and accurate answers to questions on these subjects. Above all, you always want the sales representative to provide honest and truthful testimony.
2. Deposition Strategy

The maxim that a witness should decline every invitation to comment on matters outside her personal knowledge is particularly apt in the context of sales representatives—and often particularly difficult to drive home. Generally speaking, a sales representative functions as a conduit for the transmission of information and material from the company to the physician. The sales representative is not a medical professional. The doctor, who has years of specialized education and training, knows more than the sale representative. It can be difficult to convince sales representatives to stick to their role when answering questions by opposing counsel. Be mindful of this dynamic when preparing the witness. Emphasize the general strategies employed by the plaintiff’s attorney and how sticking to matters within their personal knowledge will help limit questions and avoid potential pitfalls with their testimony.

These “conduit” materials that you should discuss with your sales representative include the product label, any promotional or marketing pieces, any studies provided by the company, and any other material or information the sales representative gave to a physician. Your witness should have been trained with these materials. On the other hand, the sales representatives would not likely have any input into the content of these materials, and it is appropriate for them to rely on medical professionals at the company to ensure their accuracy and completeness. Reminding the representative of the limited nature of his or her role will be of assistance in deflecting questions attacking the product label and promotional materials.

Generally speaking—and there are always exceptions—the sales representative should not comment on or pass judgment on documents as to which he or she has no personal knowledge. As with any witness you prepare for a deposition, it is important to emphasize that he or she has no obligation to offer opinion testimony—and likely cannot reliably opine on others’ motives or intent. On the other hand, you should delineate the types of questions—“Isn’t patient safety important to the company?” and the like—to which an “I don’t know” response is problematic. Practice those questions, and practice the follow-up questions designed to lead the witness astray.

One key strategy to hash out before preparing your witness is how much of the plaintiff’s “significant company” documents to share with him or her. In certain instances you might decide not to show the sales representative (or any witness, for that matter) documents related to the litigation. To the extent you decide to discuss certain documents with the sales representative, any document that the sales representative authored, was copied on, or may have seen in the course of employment should be reviewed with an eye to the spin opposing counsel is likely to apply. Documents that could be “spun” to suggest off-label promotion are a common target. As discussed above, there are various categories of documents that are likely available when sales representatives are involved in litigation, including call notes, custodial files, personnel records, and testimony of prescribers or surgeons regarding interactions with sales representatives and/or the company. Which documents to show a particular sales representative will vary significantly based on each case and depending on the timeframe the sales representative worked at the company. The potential relevant documents you would consider showing to a sales representative who worked at the company for a year would certainly be different than those you show a representative who worked at the company for ten years. Each witness is different and attorneys should gauge the ability of the witness to take on information so as to avoid overloading the witness with documents and information.

One deposition “prep tip” you might consider is identifying a document that you can review with the sales representative that, on its face looks significant, but when put in context is actually benign. This is a good way to illustrate—not just explain—the pitfalls of commenting on unfamiliar documents, and set the stage for developing a strategy for handling difficult or hostile document-related questions.

You should assume that plaintiff’s counsel will trot out the “wouldn't you like to know” questions, such as:
Wouldn’t you have wanted to know about [insert plaintiff’s spin on document] when you were out there talking to doctors about your product?

Wouldn’t you have liked to know that your own company had determined [insert inflammatory mischaracterization] before you talked about this product to doctors?

Wouldn’t you have liked to know that your employer hid [insert irrelevant/duplicative information] from the FDA before you promoted this product to doctors?

And don’t you think doctors deserved to know this? And patients? If your child was undergoing treatment with this therapy you as a parent would certainly want to know this, right?

These questions can be the predicate for unfortunate sound-bites used in the litigation. Your sales representative witness needs to feel comfortable with reiterating key points when confronted with them. Those themes can include that: (1) the sales representative relied on the company to determine what doctors/patients/FDA needed to know, (2) the sales representative had no reason to doubt that the company was making these determinations appropriately (and it was not the sales representative’s job to investigate that question), (3) you would have to ask a doctor what the doctor would/would not like to know, and, (4) the sales representative is not an expert on labeling/FDA regulations, etc.

Plaintiff’s attorneys are also likely to ask sales representatives “hypothetical misconduct questions” such as what action would they take in certain scenarios:

- If your company was withholding important safety information from doctors, patients and the FDA, would you want to know about that information?
- What would you do with that information?
- Would you report your company to the appropriate authorities?

This is yet another attempt to elicit speculative opinion testimony on matters outside the personal knowledge of your witness. Prepare the sales representative for these types of questions and how to appropriately respond. The witness should feel comfortable declining to speculate or offer opinions in response to these types of questions without sounding evasive or nervous. In general, prepare your sales representative to not accept assumptions that he or she has no reason to believe are true. Expect and prepare for the other standards from the plaintiff-lawyer repertoire. For example, prepare the witness, with pictures if necessary, for aggressive questions about the nature of the plaintiff’s injuries.

Finally, consider whether a direct examination is needed and what testimony you intend to elicit. In many cases, a direct examination of a pharma or device sales representative is useful to elicit the company’s story, as well as testimony that is helpful to the defense theme(s) in the case. A direct examination can also be used to develop lines of testimony from the sales representative that were not drawn-out on cross or that the witness forgot to mention. This might include the sales representative’s knowledge of the applicable prescribing physician, including whether the physician used the product in question and was knowledgeable on the risk/benefit profile. Questions you intend to ask on direct examination should be covered with the witness in advance so they are prepared to respond appropriately and accurately.

III. Conclusion

A pharmaceutical or medical device manufacturer’s sales force can play an important role in litigation. As the attorney preparing a sales representative for a deposition, it is critical to be knowledgeable on the relevant universe of documents and prepare the sales representative for the challenges he or she will face during the deposition.