

# **The Plaintiff's Liability Case: Lining Up & Preparing Your Witness**

by

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# I. Lining Up and Organizing Witnesses

No magical equation

# A. Live Witness

- Client
- Specific Causation Expert
- Epidemiologist and/or FDA Regulatory Witness
- Case Specific Witness

## B. Video Witnesses

- Ed Scolnick (President of Merck Research)

- 889:18 Q. Dr. Scolnick, you then go to say,  
889:19 "The CV events are clearly there." Do you see that?  
889:20 A. Yes, I do.  
889:21 Q. What does that refer to?  
889:22 A. What I was referring to was the  
889:23 reports of the cardiovascular events in the two arms  
889:24 of the trial and that the two curves were different,  
889:25 the incidence of curves were clearly  
890: 1 distinguishable.  
890: 2 Q. There was a difference in the number  
890: 3 of CV events between the Vioxx group and the  
890: 4 naproxen group. Is that what you're saying?  
890: 5 A. Yes, that's exactly what I'm saying.

## B. Video Witnesses

- Jerry Avorn (Epidemiologist – Harvard University)

430: 4 Q. Okay.

430: 5 Now, let me ask you, given

430: 6 all of that experience, Doctor, in your

430: 7 experience of 20-some odd, 30-some odd

430: 8 years in teaching how to communicate the

430: 9 risks and the benefits, looking at all

430:10 the ways in which Vioxx was communicated,

430:11 the risks and the benefits, the good news

430:12 and the bad news to doctors, press

430:13 releases, medical journals, labels,

430:14 detailers, all of those things put

## B. Video Witnesses

### Avorn cont'

430:15 together, do you have an opinion to a  
430:16 reasonable degree of medical and  
430:17 scientific certainty as to whether or not  
430:18 an accurate picture of the risks and  
430:19 benefits of the drugs was communicated to  
430:20 doctors so that they can make accurate  
430:21 prescribing decisions for their patients?

431: 9 THE WITNESS: That there was  
431:10 a pattern of gross distortion of  
431:11 the risks of Vioxx, and that no  
431:12 matter which way physicians turn,

## B. Video Witnesses

Avorn cont'

431:13 whether it was looking at the  
431:14 label, hearing what they were  
431:15 hearing from the Merck-trained  
431:16 sales representatives, trying to  
431:17 read the literature in the medical  
431:18 journals and trying to get some  
431:19 accurate, complete depiction of  
431:20 what was happening in the clinical  
431:21 trials, even the information their  
431:22 patients were bringing to them  
431:23 from the commercials and ads that  
431:24 they had seen, across the board,

## B. Video Witnesses

Avorn cont'

432: 1      there was a pattern of what I  
432: 2      would characterize as systematic  
432: 3      distortion that rose almost to the  
432: 4      level of grotesque. And, frankly,  
432: 5      it was an embarrassment for me as  
432: 6      a member of the medical profession  
432: 7      that this was going on in  
432: 8      presenting information to doctors  
432: 9      in such a one-sided and lopsided  
432:10      way.



## B. Video Witnesses

- Eric Topol (Cleveland Clinic)

52: 2 Q. Do you believe that there

52: 3 were, in the context of what Merck did,

52: 4 "outrageous lies" by Merck?

52: 7 THE WITNESS: I believe that

52: 8 the data has been seriously

52: 9 misrepresented, yes.

52:11 Q. You said in the next to last

52:12 sentence there, "This," the words, "This

52:13 cannot." Do you see it in the very last

52:14 sentence?

52:15 A. This cannot?

52:16 Q. "This cannot stand and the

52:17 truth about Vioxx needs to come out."

52:20 THE WITNESS: Yes, yes.

52:21 That's what I wrote.

## **B. Video Witnesses**

- David Anstice (Director of U.S. Human Health)
- David Graham (FDA)
- Laura Demopolous (Sr. Dir. CV Research)

## II. Preparing Your Witness

- Client / Family / Friends
- Prescribing / Treating Physicians
- Experts

# A. Spend Time with Client

## 1) Flush out any potential proof of use issues

- Single biggest issue is Plaintiff's credibility
- Account for each pill taken
- Confirm that the pharmacy profile is accurate

# A. Spend Time with Client

2) Mock Exam

3) Record mock exam

- Note problem areas with testimony

# A. Spend Time with Client

## 4) Address Prior Medical History

- Prior history of heart MI or CVA
- Prior history of cardiovascular related problems  
(CABG, PICA, ect.)
- Smoker (former or current)
- HTN
- Hypercholesterolemia
- Diabetes
- Atherosclerosis
- Family History

# A. Spend Time with Client

- 5) Note problem areas with prior medical history in order to diffuse with Plaintiff's Expert and dilute with Defense Expert
  
- 6) Address social history
  - Crimes
  - Drugs
  - Alcohol

# A. Spend Time with Client

## 7) Address damages

a.) Death

b.) Non-death

- Past/Future lost wages (financial)
- Past/Future medical expenses
- Any residual health problems
- Pain and suffering
- Mental anguish
- Loss of enjoyment of life



## **B. Spend Time with Family/Friends**

- Determine what testimony will be helpful (or) harmful
- Older clients – Good to meet with other family members for more accurate recollection

# C. Treating/Prescribing Doctor

- Fighting Bias
- Educational Tools
- Communication with Sales Representatives
- Addressing Plaintiff's Health Issues

# D. Expert Preparation

Challenge is to keep them focused on  
Litigation Issues –  
Not Academics

# D. Expert Preparation

- 1) Experience Level
  - a) Experienced Expert (pros/cons)
  - b) In-Experienced Expert (pros/cons)

# D. Expert Preparation

## 2) General considerations

- Understanding Plaintiff's Burden of Proof
  - Testimony must be based on reasonable probability not possibility!
- Proving Causation (General or Specific)
  - Product must be a producing cause of the injury

# D. Expert Preparation

## ■ Concessions

- Minor points are ok
- Major points can't happen

## ■ Dealing with Additional Variables

- Expert should need time to evaluate additional variables that are not included in lawyer's question

# D. Expert Preparation

- Utilize consultants to educate experts
- Diffuse client problem areas
- Able to cite specific articles/studies to specific opinions
- Package Insert

# D. Expert Preparation

- Usage (Dosage Related)
  - (i) 50 mg: no problems
    - VIGOR
  - (ii) 25 mg & 12.5 mg
    - Ray Study
    - Solomon Study
    - Graham Study
    - APPROVe
    - Protocol 090



# Duration Related

## (i) Short Term

- Solomon study says increased risk at 90 days

- VIGOR

- ADVANTAGE

# Duration Related

## (ii) Long term

- APPROVe – increased risk at 18 months – 36 months
- VIGOR
  - Graph for VIGOR shows increase early on and consistently there after

# Expert Check-list

- Proof of Use
- Medical Records
- Diagnostic Testing
- Catheterization Tapes
- Death Certificate
- Copy of Expert Disclosures
- Deposition (Name of Deponent & Title)
- Any relevant “Hot Docs”

## 4) Expert Disclosure

- Allow adequate time to prepare before deadline
- Make sure expert prepares draft for review
- Provide necessary information to expert

# Conclusion

- Witness organization – more efficient with the number of video witnesses vs. life witnesses
- Treatment/Prescribing Doctors can be extremely helpful during trial
- Client's credibility is important – proper time with them in order to be prepared
- Spend time with Experts – make sure they stay focused on issues of the case