



# Unlock the Key to **DEPOSING SALES REPS**

Knowing what documents to request and questions to ask will help you extract crucial evidence in your drug and device cases. *By* || **WHITNEY BUTCHER**

**D**eposing pharmaceutical sales representatives can provide a bounty of information on what a company knew about a dangerous or defective drug or medical device, when it knew it, and its sales and marketing strategies for that product. Here are a few crucial areas to cover.

## **Request Key Documents**

The deposition notice should request specific documents, including

- the sales training manual
- the sales representative's personnel file
- retained documents (such as notebooks and product brochures)

- all communications and documents related to the rep’s interactions with the plaintiff’s prescribing or implanting doctor.

**Sales training manual.** This helps you learn the sales lingo (words and phrases used to discuss sales and products with doctors) and get a picture of what motivates employees. It details the rep’s objectives and specifies “talk tracks” or talking points for the rep to use with surgeons and prescribers. If the doctor asks a certain question, the rep uses the talk tracks to provide a set response to push the doctor in the direction the company wants.

The manual may also describe how to get into a hospital or medical facility and how to deal with an “objector”—a doctor unreceptive to the drug or device. Become familiar with this document, and walk through it with the sales rep.

**Personnel file.** This identifies any warnings or complaints that managers, other employees, doctors, nurses, or hospital administrators made about the rep. This can reveal whether a rep used unscrupulous sales tactics or was comfortable bending the rules—and whether the company rewarded or punished that behavior.

**Retained documents.** Sales reps are required to keep certain documents. Request all of them, including documents the sales rep kept during communications with various hospitals or doctors such as a rep’s calendars, personal notebooks, brochures, and business cards. Retained documents also may include “training” materials, which sales reps use to push their products to doctors, and “table” materials, such as posters and signs a rep uses in a hospital to promote a drug or device.

**Documents related to your client’s physician.** Finally, request any documents involving the plaintiff’s physician. You are likely deposing the sales rep

because he or she sold the product to the doctor who implanted or prescribed it to your client. Every call note, email, text message, order form, and any other correspondence between the rep and the doctor should be produced.

If the company objects to producing these documents, argue that they are highly relevant and because a lawsuit has been filed, there should not be privilege concerns. A sales rep likely will have communicated with a surgeon or prescribing doctor hundreds of times if they have a close relationship. Any of those communications dealing with sales of the product at issue, or your client specifically, are discoverable.

Consider using the defense fact sheet—all of the “hot documents” identified during discovery—to help tell the story of the case. Most defendants will agree to produce one in exchange for the plaintiff fact sheet, and this will provide information about your client’s implanting or prescribing doctor and his or her relationship with the company, among other things.

### Know the Sales Rep

Company sales hierarchies generally consist of a territory manager or sales representative who is supervised by a district manager who is supervised by a regional manager. Other employees you depose may be higher up the corporate chain and better trained at dodging your questions. Sales reps rarely have medical training, but they interact directly with physicians and know the products they are selling inside and out.

Before the deposition, try to determine whether the rep is a company loyalist or might have an axe to grind. If you are deposing a sales rep at the territory manager level who has held that position for five or more years, then you probably have a loyal soldier who will defend the company to the end. Do

not argue with this person; instead, ask pointed questions that get to the heart of the company’s sales strategy, such as: “Wouldn’t you agree that the company has a duty to warn if its drug could harm unborn children?”

However, your deponent may be willing to be more open if he or she has been with the company for only a year or two, has bounced among several different companies, or has been fired by the defendant. Enlist this person to help expose the company’s misconduct. Again, ask about the company’s duties and the importance of warning patients and doctors about a product’s known risks.

Many excellent free resources can help you research a particular sales rep. I suggest starting with LinkedIn to determine that person’s tenure with the company as well as previous positions and employers. To find out about a rep’s past, you can use Wayback (<https://archive.org/web>), which saves web pages and posts that a sales rep may have deleted or may not expect you to find. This site requires some patience and digging but can provide great information.

Don’t forget the numerous chatrooms such as the message boards on CafePharma.com or Medtech[y] (<https://medtechy.com>) where sales reps can ask questions, discuss different sales strategies, and vent about frustrations with their employers. The rep may not anticipate you discovering this information, so you can use it to throw him or her off track. Look for a post where the sales rep or someone in a similar position talked about using unethical methods (such as hiding an adverse event) to get a doctor to commit to a product.

### Deposing the Sales Rep

Your objectives are to establish the marching orders given to the sales rep, the goals for the specific product at

issue, and how the company incentivized its reps to meet those goals. Ask the sales rep about any medical or scientific education or any formal training before or during employment for the company. For example, most companies will send new reps out for a multi-week training course on basic anatomy, biology, and sales practices. Ask:

- What did you learn during this initial course?
- What, if any, ongoing training or learning programs are you taking?
- What, if any, prior experience or education do you have in the field of study?

Also ask about their compensation package and structure:

- Is your income based completely on commission, or do you receive a base salary and a commission?
- Are you required to grow the territory, target a doctor, or get into a new facility?
- Is your success tied to a bonus?

Sales reps have an inherent interest in selling their company's products because often all or most of their pay is tied to successful sales numbers. You should determine the rep's "target sales" or the expected number of sales from a specific hospital. Reps who exceed this target may be eligible for a substantial bonus—a direct financial benefit of selling the drug or device. Find out the growth percentage in a specific territory and whether sales have increased or decreased since the rep took over the territory.

Physicians and sales reps can form very close relationships, so ask about any time they spent together outside of the hospital, including attending seminars, having lunch or dinner, or even doing recreational activities such as running or mountain biking. Find out every time that the sales rep communicated with the physician about the drug or device. Also ask questions about the timing of



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when the physician started using the product. Was it during medical school? Was the physician using a different drug or device but then targeted by the sales rep? You need to know which scenario you are dealing with.

If you can obtain sales call notes, you may be able to uncover a pattern of misconduct and demonstrate what the company was emphasizing in its marketing and how much it knew about the drug's or device's risks or adverse side effects.

For example, a doctor may share an ongoing patient problem and ask whether it could be connected to a certain drug or device. If the rep responds with talking points from the training manual (diverting attention from the problem) or does not give the adverse event proper attention, that could be a red flag. This information may even help support a claim for punitive damages because if you can show that the company knew about a pattern

of failing to report adverse events, this could mean that it was instructing reps to hide information or underreport.

If bringing a failure-to-warn claim, be prepared to discuss the label (and all previous iterations) at length. Review every version of the label before the deposition. During the deposition, be prepared to go through these, as well as every warning that was on the black-box label (if applicable), every warning that *should have* been on the label, and what side effects the rep discussed with doctors and others in the hospital system.

Be thorough in your preparation, keep pressing where it hurts, and let sales reps talk as much as they want—they might just reveal crucial information. ■



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