

Novartis Trial Holds Key Lessons For Attorneys

By Erin Fuchs

Law360, New York (May 26, 2010) -- In his final statement to jurors before they found Novartis Pharmaceutical Corp. liable for wide-ranging sex bias, a Vedder Price PC defense attorney described a plaintiff as “so fragile,” and remarked that he'd never seen a witness cry so much on the stand.

“It's like she had been knifed. Honestly. What was wrong with this woman?” Richard H. Schnadig, a veteran employment attorney, told jurors. “Nothing bad ever happened to her.”

According to legal experts who followed the sex bias trial earlier in May, Novartis' road to a \$250 million punitive damages verdict was paved with legal blunders that include Schnadig's apparent disdain for the plaintiffs. Here, the experts present lessons attorneys should take away from the trial.

Don't Attack Sympathetic Plaintiffs

While it may benefit defense attorneys to be aggressive during depositions, attacking sympathetic plaintiffs in front of a jury can backfire, said Michael Selmi, a professor at The George Washington University Law School, who has litigated employment cases at the U.S. Department of Justice's Civil Rights Division.

Vedder Price's cross-examination of Marjorie Salame — who claimed that a doctor raped her after a Novartis-sponsored golfing event — made Selmi cringe, he said.

During Salame's cross-examination, Vedder Price attorney Amy Bess pointed out that Salame “voluntarily” accepted a ride home from the doctor before he allegedly raped her.

Bess also questioned Salame about her confrontation of the wife of the doctor who she alleges raped her, during a cross-examination that Selmi described as “a textbook example of how not to cross-examine a witness.”

“It was offensive from start to finish, and that just doesn't fly with a jury,” he said.

Novartis' strategy was reminiscent of old-school defense tactics against sex discrimination and rape allegations in which defense counsel attack the woman's credibility, he added.

“There wasn't any acknowledgment at all of the difficulty that the woman had suffered,” he said.

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Charlie Craver, another law professor at George Washington who previously worked at Morrison & Foerster LLP, said “gratuitous attacks” could garner sympathy for the plaintiffs.

The defense team's attitude reflected the accusations of indifference to harassment at the heart of the lawsuit, said Roy Futterman, a director at Doar Litigation Consulting who assisted the plaintiffs with litigation strategy.

“They heard in the case that Novartis had been disrespectful and dismissive of women, and then they saw in court an attitude toward women that was also disrespectful and dismissive,” he said.

In order to win over a court and a jury, defense lawyers must keep in mind that they're “dealing with human beings” when they present their case, said Craver, who stressed that he didn't actually watch the Novartis trial.

“What you have to be as a litigator is you have to be a good reader of people,” Craver said. “You have to understand when you can take the gloves off, when you can leave the gloves on.”

Schnadig, Craver said, could have taken a softer approach in his closing arguments, when he said that he'd never seen a witness cry as much as former sales representative Tara Blum.

“I might say you're dealing with someone here who seems to be unusually sensitive, and I don't think the conduct warranted such an emotional state,” Craver said.

Choose Your Experts Wisely

While a corporate defendant doesn't do itself any favors by berating alleged victims, it can also hurt its case by choosing an expert witness who can be easily attacked by plaintiffs.

Novartis' expert Finis Welch admitted that errors in his data suppressed the statistical significance of his analysis, the plaintiffs' side said during closing arguments.

That same expert had also written a paper called “In Defense of Inequality” for the American Economic Review in 1999, the plaintiffs' lawyers also pointed out repeatedly.

The plaintiffs' allusions to Welch's paper highlight the fact that lawyers should always be aware of their experts' scholarship, Craver said.

They should also know that the other side will scrutinize their experts' records for possibly damning tidbits, he added.

But it was Welch's statistics that really hurt the defense, said Grant E. Morris, an attorney who represented the Novartis plaintiffs. “He's their key statistician, and he's the one that they really put all their hopes behind,” Morris said. “When his story didn't hold up, essentially the rest of the case fell apart.”

Take Pains To Ensure Your Witnesses Can't Be Flipped

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The Novartis plaintiffs claim that they were able to shoot down Welch's arguments and even use his data to their advantage. But Welch is just one of several Novartis witnesses who provided cross-examination testimony that benefited the plaintiffs.

In his closing arguments, Davis W. Sanford of Sanford Wittels & Heisler LLP said that at least eight of Novartis' own witnesses had admitted there weren't enough women managers.

The plaintiffs were also able to use Novartis' own witnesses to take issue with the effectiveness of the company's diversity programs and its human resources division.

Novartis witness Melissa Parker, a regional sales director, acknowledged that the company's diversity counsel did not make recommendations to human resources about pay or hiring practices, Sanford said.

Another Novartis witness, Sharon Larrison, who chaired the women's leadership program, testified on cross-examination that the group's mission wasn't to change how the company viewed women, according to Sanford.

And Novartis human resources executive Maria Larosa acknowledged that few managers had been fired because of sales representatives' complaints, even those that had been substantiated.

Futterman, the plaintiffs' litigation strategist, said that not only was his side able to discredit Novartis' expert, but it also "destroyed their HR department."

In the end, Novartis underestimated its opponent by tying its defense to the fact that few women had complained to a broken HR department, according to Futterman. The drugmaker also didn't do itself any favors by attacking the credibility of the plaintiff witnesses, he added.

"I think they thought ... by doing that, they could eliminate the ability for the individual anecdotes to connect up to a pattern or practice of discrimination," he said. "They missed the point that the individual anecdotes were going to define a systemic issue."

--Additional reporting by Christie Smythe

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