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Vioxx 'Trial in a Box' Cuts Cost of Filing Suit

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So far, only a small number of plaintiffs' lawyers have been able to go toe to toe with Merck & Co. in court over its drug Vioxx. The cost of sifting through millions of documents, getting testimony from Merck officials and preparing a strategy for court can run as much as \$1 million, experienced lawyers say, a price tag that only a handful of firms who do mass tort work can pay.

Now, the price of taking Merck on in court is falling. A steering committee of Vioxx plaintiffs' attorneys has put together a premade trial package that can be used for a Vioxx case. The package is free, but attorneys must pay a contingency fee of 3% or 6% of any rewards or settlements to the lawyers who assembled the package. The arrangement applies to all federally-filed cases. Using the package can bring the out-of-pocket cost of putting on a trial down to about \$50,000 -- a small enough sum to open the floodgates for law firms of all sizes to take a swing at Merck.

The package lays out a roadmap for a Vioxx case and includes what the attorneys say are the most damaging documents from Merck, video testimony of key players and prepared graphics to present in the courtroom. At a recent mass-tort seminar where the package was pitched to plaintiffs' attorneys, a lawyer even presented a mock opening statement.

"It won't exactly be paint by numbers, but that's the basic concept we have in mind," says **Thomas R. Kline**, a key plaintiffs' attorney in the Vioxx litigation who helped develop the package. Mr. Kline is a member of the plaintiffs' steering committee, the 12-attorney group appointed by U.S. District Court Judge Eldon E. Fallon to manage the pretrial fact-finding in the federal Vioxx litigation.

So far, some 200 firms have signed a contract to obtain the package, according to lawyer Leonard Davis, whose firm Herman, Herman, Katz & Cotlar is the court-appointed liaison counsel in the federal Vioxx litigation.

Fighting Merck on Vioxx is by no means a slam dunk. The company has set aside a war chest of \$685 million for Vioxx legal costs for this year alone. Merck has vowed to fight almost every Vioxx case individually, saying that heart attacks and strokes are so common it will be difficult to prove any person's injury was due to Vioxx. In three of the five cases that have gone to trial, juries ruled that Vioxx did not contribute to the plaintiff's injuries.

Lawyers using the package will still have to prove Vioxx caused the injuries in their cases. "A trial package can be very helpful on the liability piece of the trial and showing that, in general, Vioxx can cause heart attacks and problems," says Howard Erichson, a professor at Seton Hall Law School. "What it can't do is finish the trial off by proving Vioxx caused harm to a particular individual."

Merck says it's not threatened by plaintiffs' attempts to standardize the cases. "It's part of the standard plaintiffs' playbook to try and create a cookie-cutter case, but these cases are about the science, which is complex, and the individual facts in each case," says Ted Mayer, co-lead outside defense counsel for Merck. "We're ready to try these cases. We've said that, and we've proved that." In the most recent Vioxx trial in Atlantic City, N.J., where two cases were consolidated, a jury found Merck liable for failing to warn about Vioxx's cardiovascular risks for both plaintiffs, but that Vioxx only contributed to one man's heart attack. The two attorneys who have prevailed against Merck aren't part of the group that created the package and did much of their own discovery. But plaintiffs' lawyer Robert Gordon, who won a \$13.5 million award last week on behalf of John McDarby, said evidence and information has been exchanged between his team and those who made the package.

Lawyers wanting to sue Merck already have access to the reams of Vioxx documents and testimony procured by the steering committee, and plaintiffs' lawyers typically share such materials to increase pressure on defendants. But the Vioxx prepackaged trial organizes and edits that sea of evidence. The package includes depositions taken by lawyers who filed cases before Vioxx was withdrawn in September 2004, such as W. Mark Lanier, the Texas attorney who prevailed in the first Vioxx trial last year.

Andy Birchfield, co-lead counsel of the federal plaintiffs' steering committee, says the package "will be enhanced and added to over the following months and years." The deposition next month of FDA drug-safety reviewer David Graham, who has often been a staunch critic of the drug industry, will become part of the package. The steering committee and firms that contributed to the Vioxx trial package will split the revenue from the fee, upon approval of the fee split by Judge Fallon.

Plaintiffs' lawyers say if the package spawns more Vioxx lawsuits, it could exert greater pressure on Merck to settle instead of fighting on -- and that's additional economic motivation for creating the package.

Premade trial packages aren't new -- they were drawn up in suits over the drugs Propulsid and Rezulin, both withdrawn over safety issues, though those packages were completed after the drug makers settled and mostly used by holdouts. A trial package was also assembled in the fen-phen diet-drug litigation.

Attorney Michael J. Piuze, who has tried tobacco cases, put together what he dubbed "Trial in a Box" for tobacco suits, which lawyers can access for free online.

Attorney Richard Golomb of Golomb & Honik PC, a Philadelphia law firm with eight lawyers, decided to buy the Vioxx trial packet after getting a sample of it at the mass-tort seminar last month. Mr. Golomb says he's filed about 10 Vioxx cases in state and federal court and that for such a small number of cases, the "package is very helpful because we don't have to recreate the wheel." He says he thinks the 3% assessment fee of any awards is "reasonable." Still, he says, "If I get an award of \$20 million, that's a lot of money" for the preparers of the package.

Some lawyers say that attorneys who are late to the litigation have few options but to buy the trial packet. Kathryn Snapka, who is part of the trial team in the Vioxx case currently being heard in Rio Grande City, Texas, says her legal team did their own discovery because their case was originally scheduled for Feb. 14, 2005. But a couple of key depositions were taken by early Vioxx lawyers at the end of the year, and her team used those. The system "may inhibit people who want to take depositions themselves in their own fashion because Merck will contend that these witnesses have already been deposed in the litigation," Ms. Snapka says.

Lew Garrison, a plaintiffs' lawyer in Birmingham, Ala., says he signed up happily for the package. His nine-lawyer firm has about 100 Vioxx cases, two of which are scheduled for trial later this year in Jefferson County, Ala. Mr. Garrison says the Vioxx package is more organized than the fen-phen package his firm previously signed up for.

Merck says its defense will remain the same, despite the trial package created by plaintiffs. "There's always an effort to try and oversimplify the issues and to the extent any such package plays into that, certainly we'll be able to respond," Mr. Mayer says.