Civil Jury Trials in U.S. Federal Courts

16 SEPTEMBER 2017

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Partner, Cravath, Swaine & Moore LLP

NEW ZEALAND BAR ASSOCIATION

2017 ANNUAL CONFERENCE

Session 5 – International Comparative Advocacy
"The Trial of Trials"

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TOPICS

- **Unique Characteristics of Civil Trials in the U.S.**
- **The Challenges of Preparing for a Civil Jury Trial in the U.S.**
  - The Need to Communicate Complex Concepts to a Jury
  - Understanding Your Jury – Jury Research
  - Mock Trials & Observation of Mock Jury Deliberation
  - Extensive Use of Professional Graphics at Trial
- **The Mechanics of a Civil Jury Trial in the U.S.**
  - Presenting a Compelling & Comprehensible Narrative to a Jury
  - Use Witnesses to Tell Your Story
  - Evidentiary Issues are Key
- **Some Observations**

UNIQUE CHARACTERISTICS OF CIVIL JURY TRIALS IN THE U.S.

- **Constitutional Right to a Civil Jury**
  - Seventh Amendment to the U.S. Constitution
- **Plaintiffs' Bar**
- **Class Actions**
- **Contingency Fees/Litigation Funding**
- **Potential for Significant Damages Awards**
  - Treble Damages
  - Punitive Damages

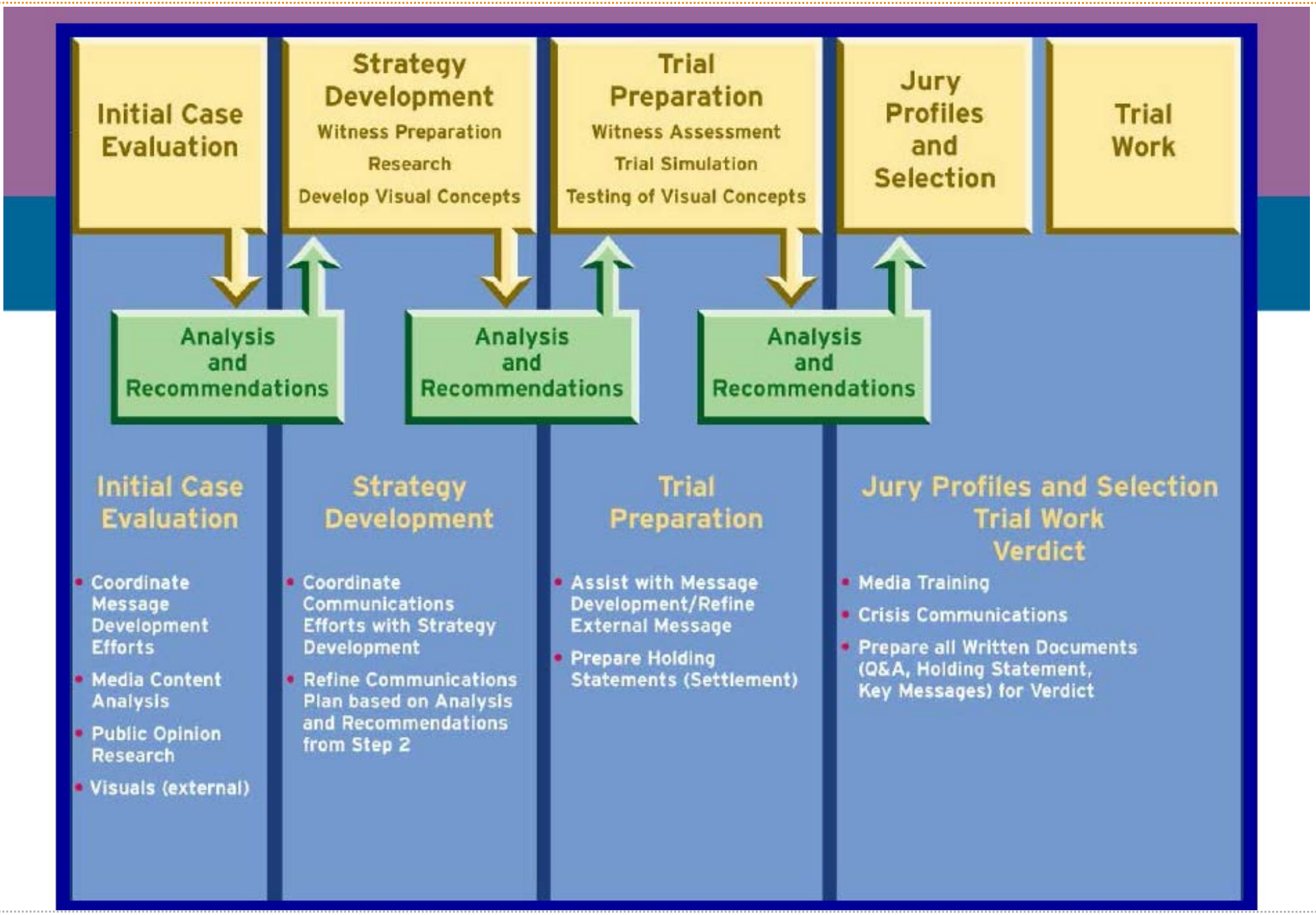
PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **The Need to Communicate Complex Concepts to a Jury**
  - Economic Concepts
  - Accounting Concepts
  - Science & Technology (IP)
  - Damages

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Understanding Your Likely Jury – Jury Research**
  - Typical Trial Consulting Services Include:
    - *Venue Evaluation Research* – tests attitudes of jury-eligible citizens in the venues most likely to be available in potential litigation
    - *Damages Analysis & Control Research* – examines how jurors perceive the most critical issues and elicit their evaluation of potential damages
    - *Jury Profiling Research* – to produce effective voir dire questions (as permitted in that venue)
    - *Strategy Development Research* – tests case strategies and themes, to develop the most persuasive story possible
    - *Solution Generating Research* – identifies which argument(s), evidence and individuals will be most persuasive to the triers of fact (the jury)
    - *Witness Evaluation Research* – auditions potential fact and expert witnesses in front of surrogate jurors and helps polish their presentations before they are deposed or give testimony at trial

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.



PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Information is Obtained Through:**
  - Surveys of Potential Jurors
  - Mock Trials & Observation of Mock Jury Deliberation

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Telling Your Story in Court – Extensive Use of Professional Graphics at Trial**
  - Use of “Hot Seat Operator”
  - Used in Opening & Closing Statements
  - Used with Fact Witnesses (including on cross-examination and impeachment)
  - Used with Expert Witnesses

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Some Examples:**
  - To Teach the Jury

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

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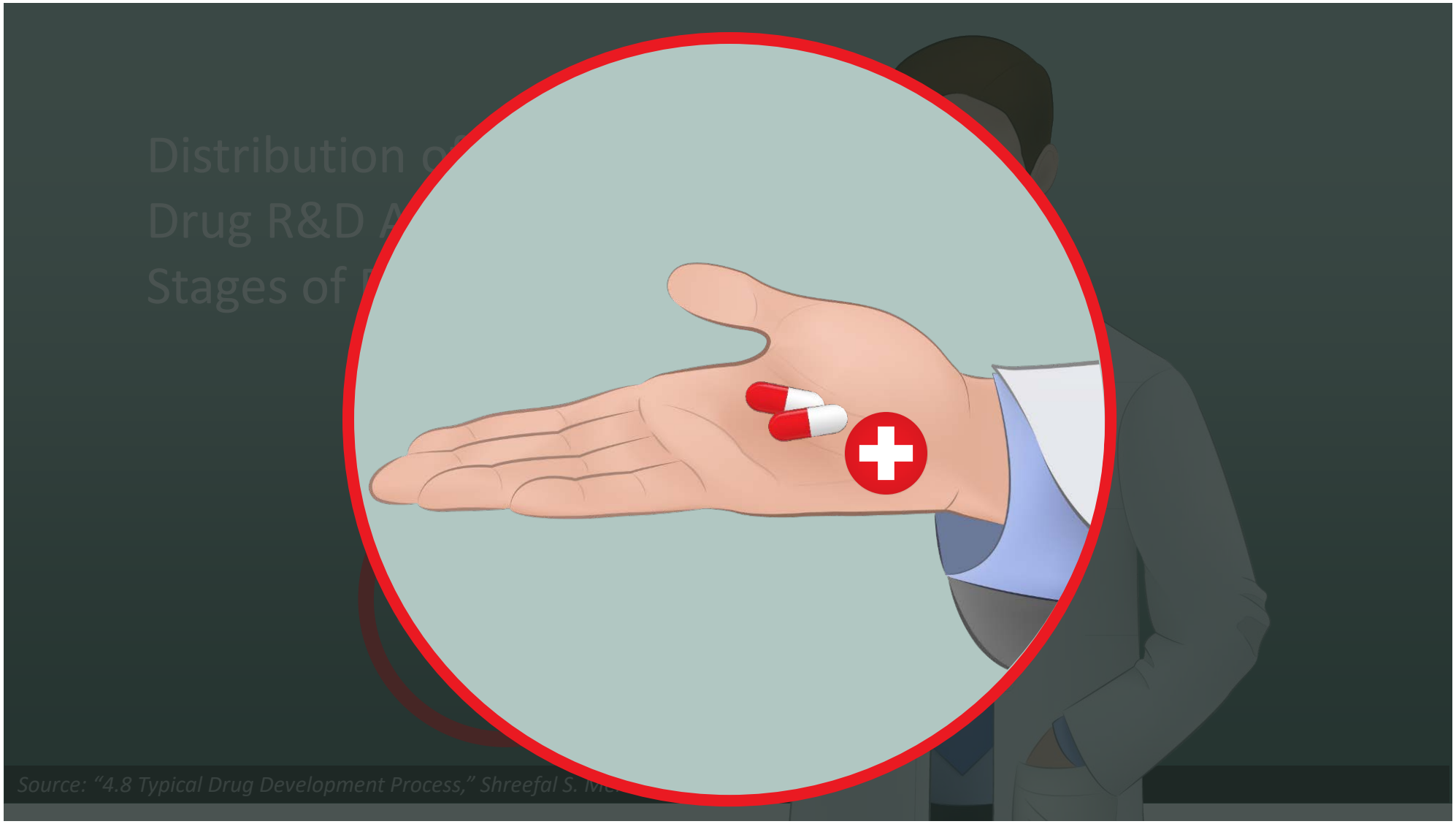

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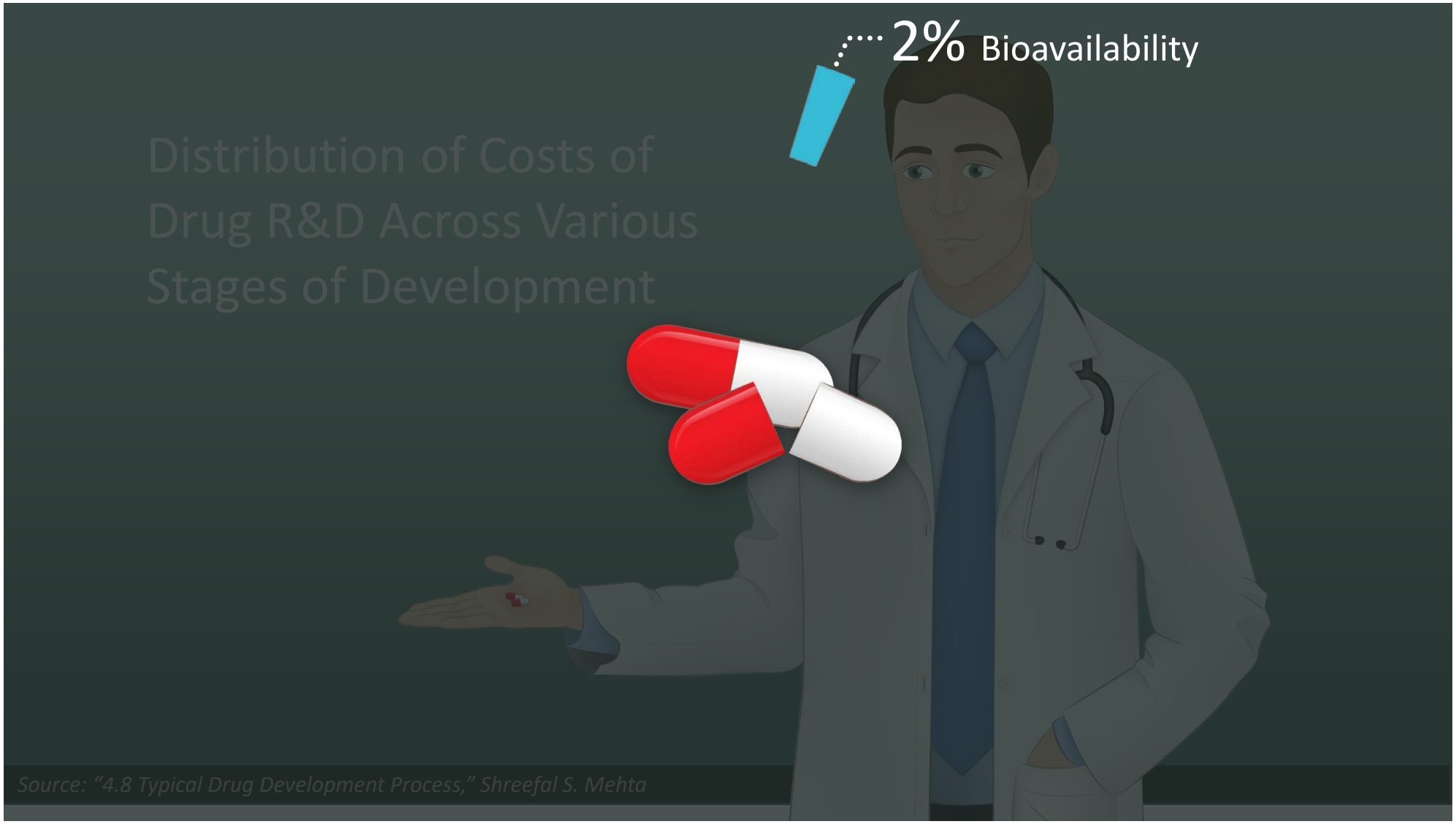

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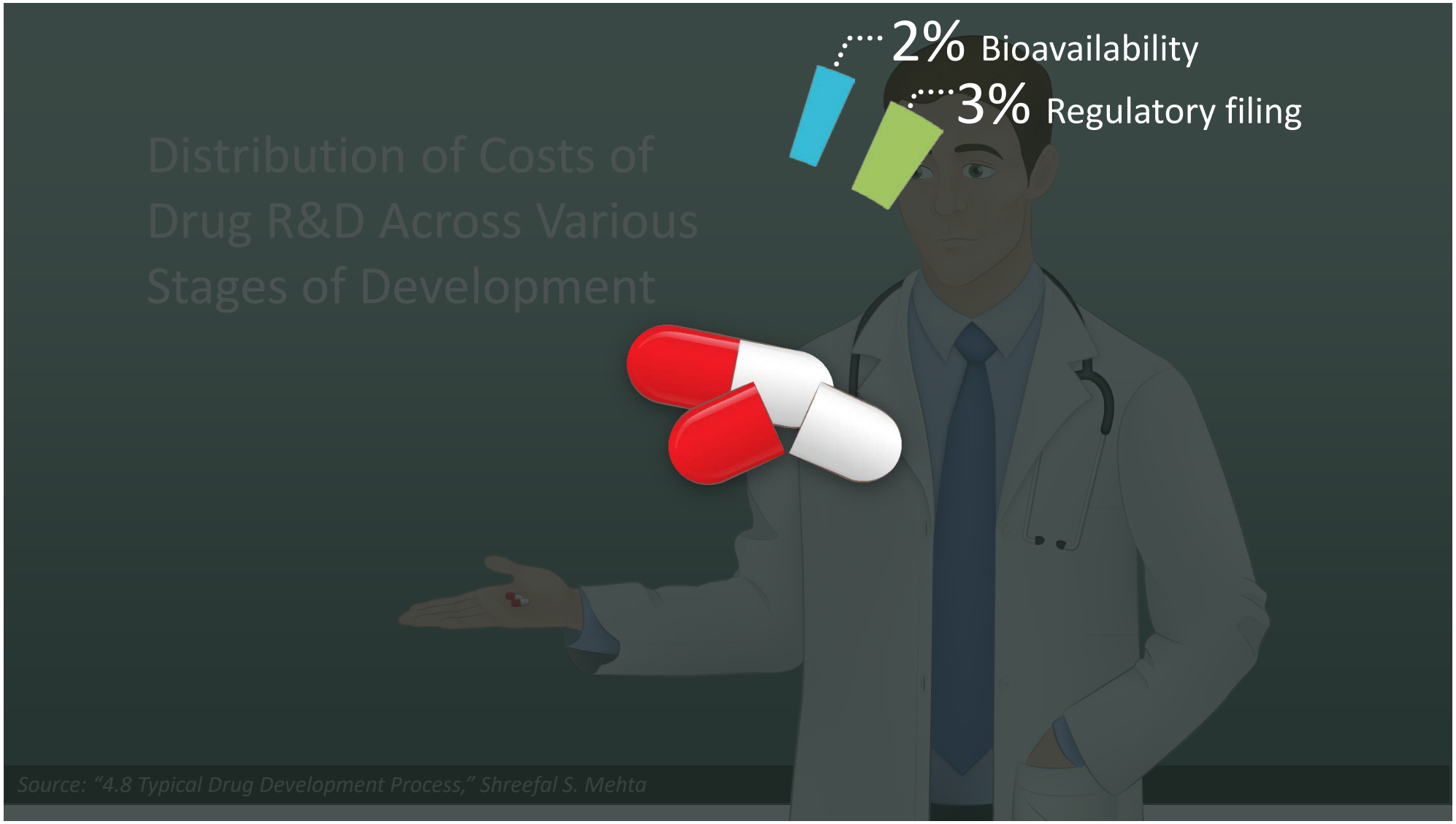

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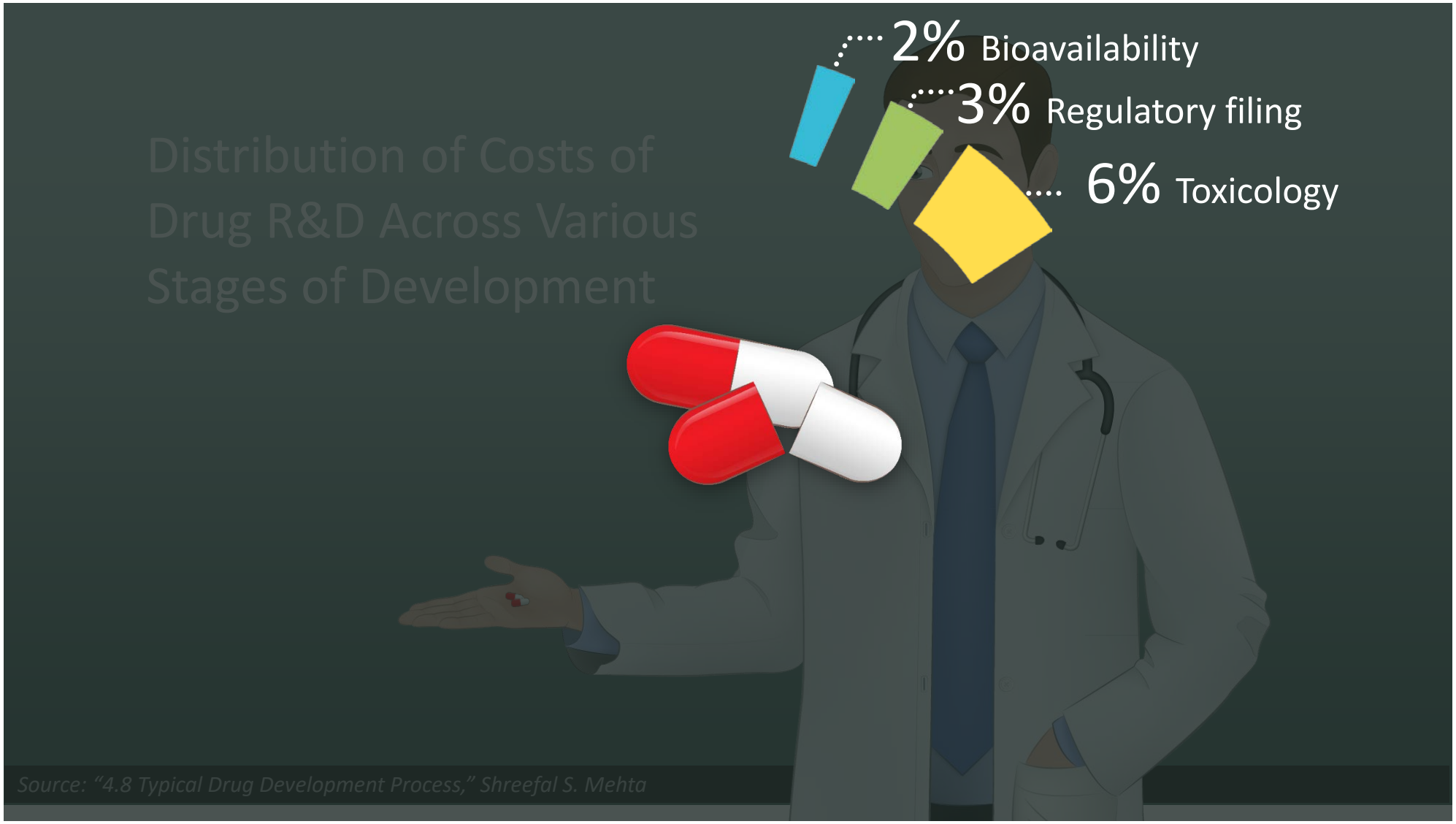

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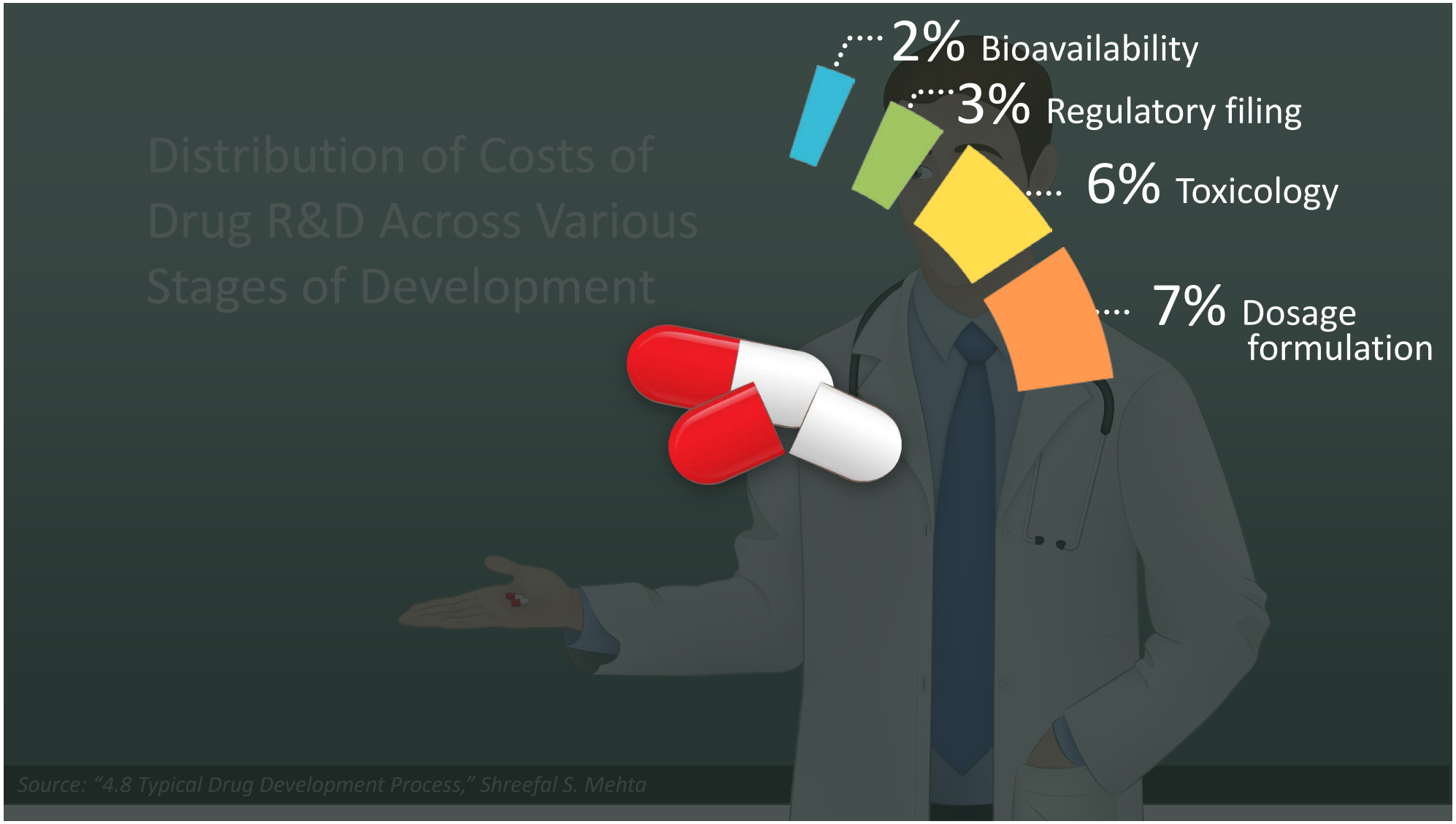

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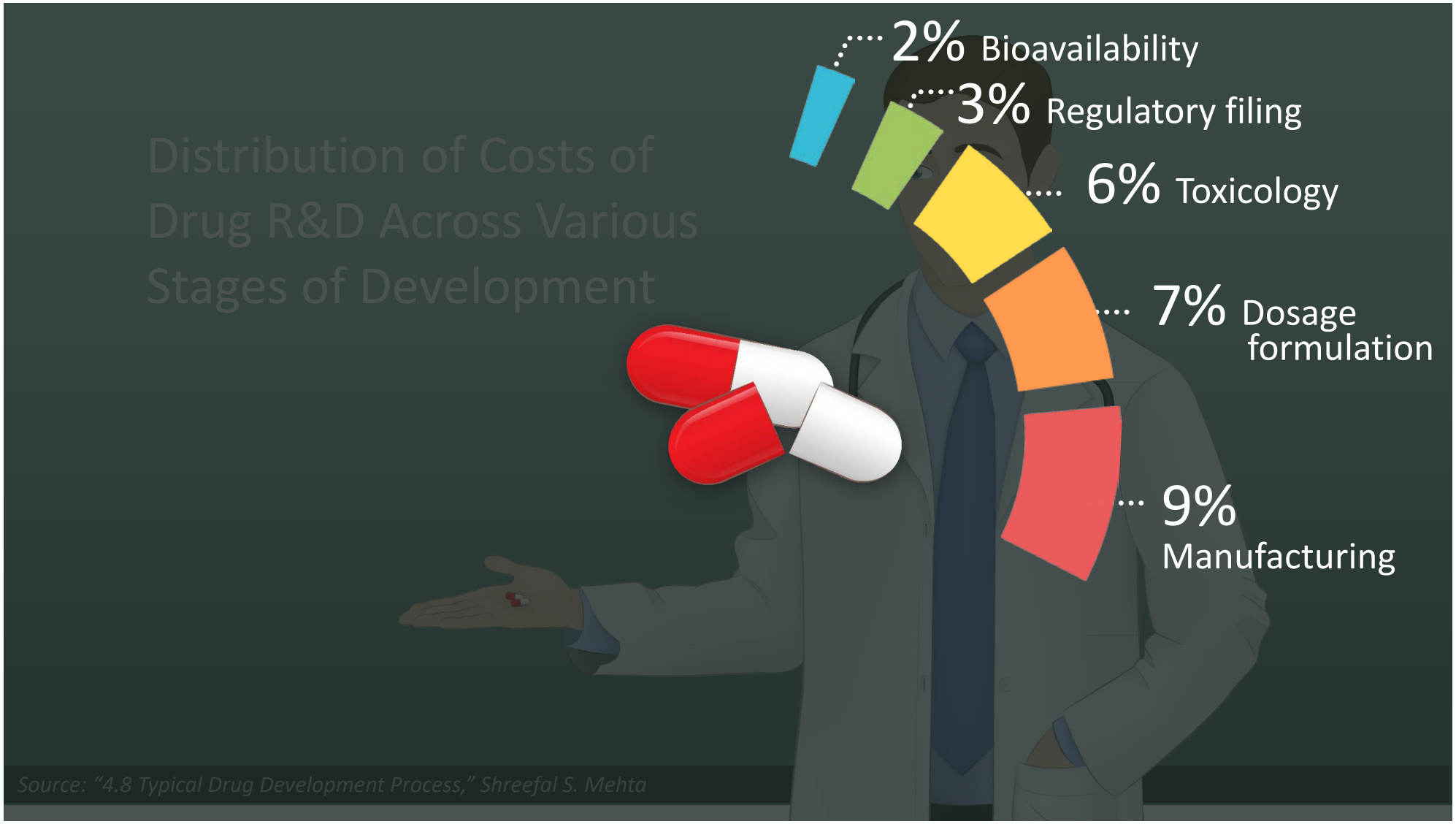

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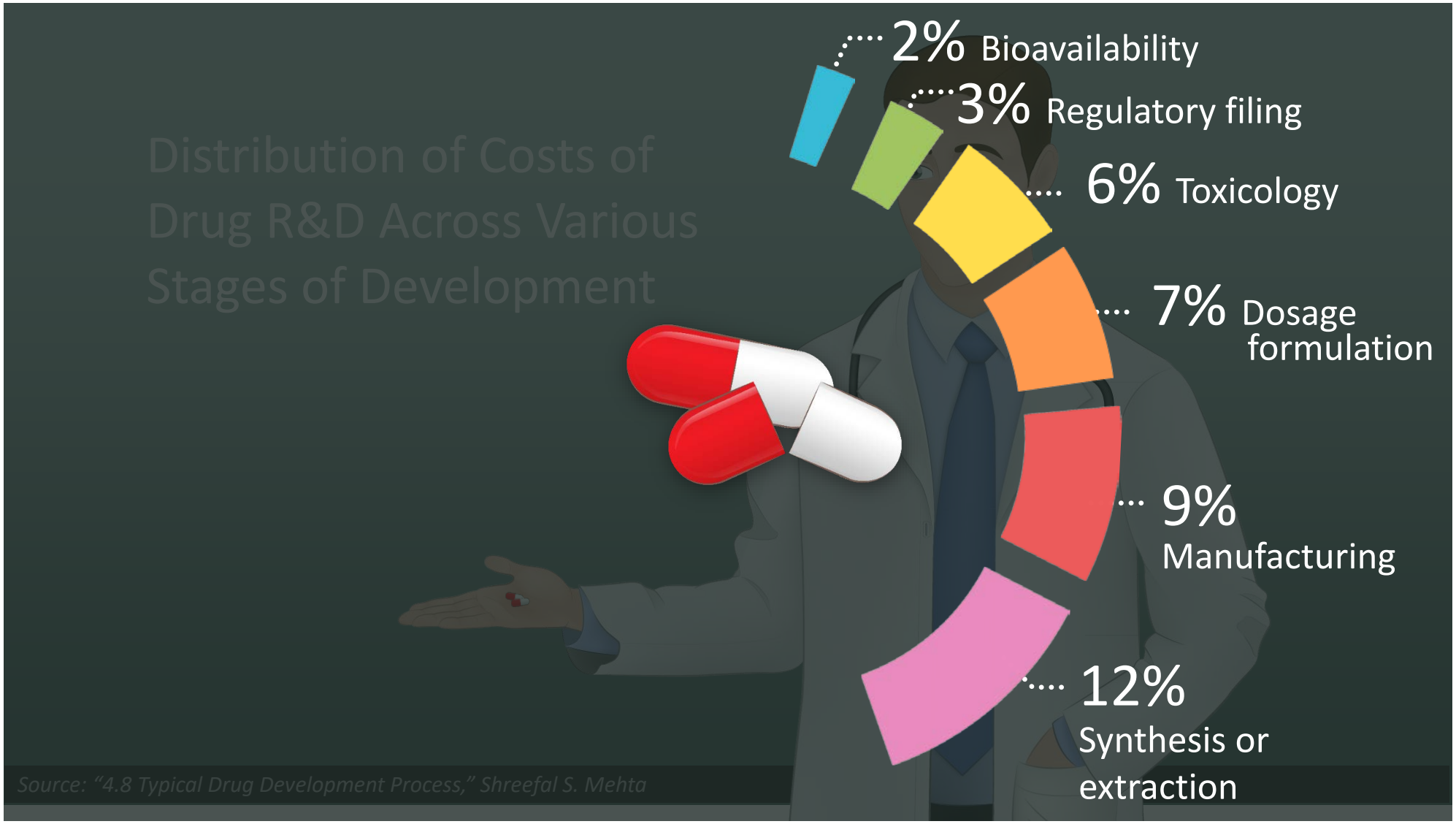

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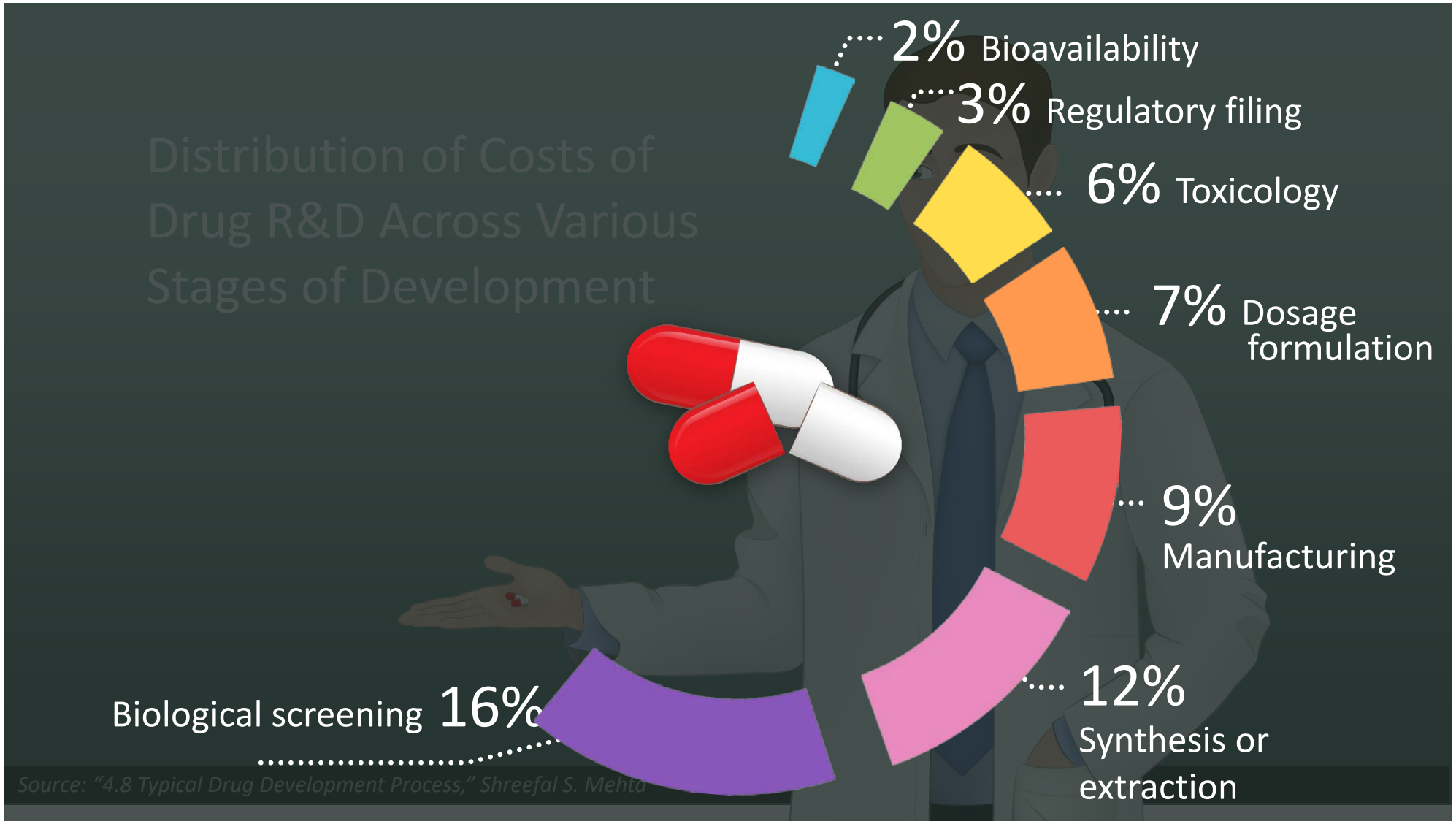

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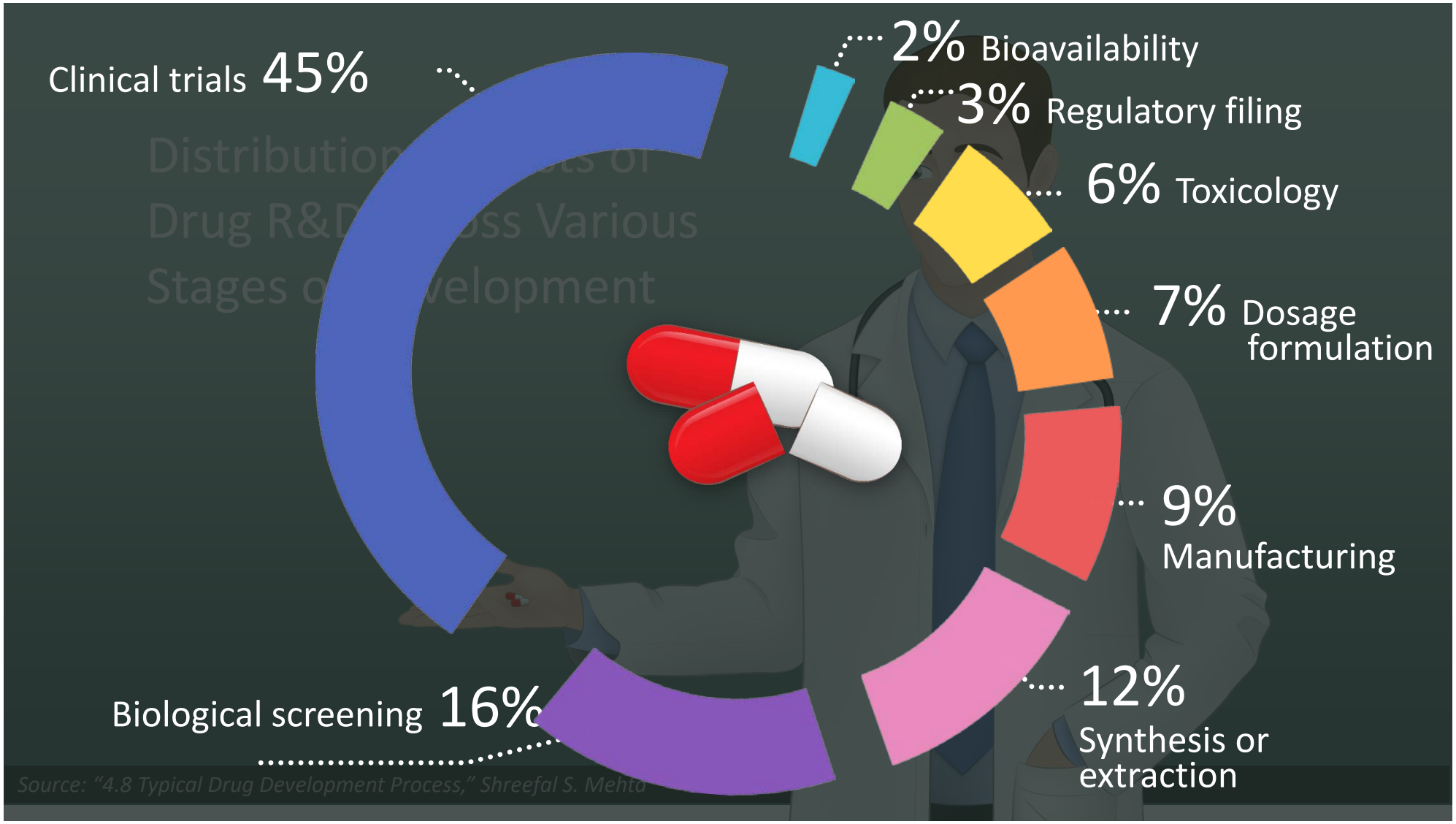

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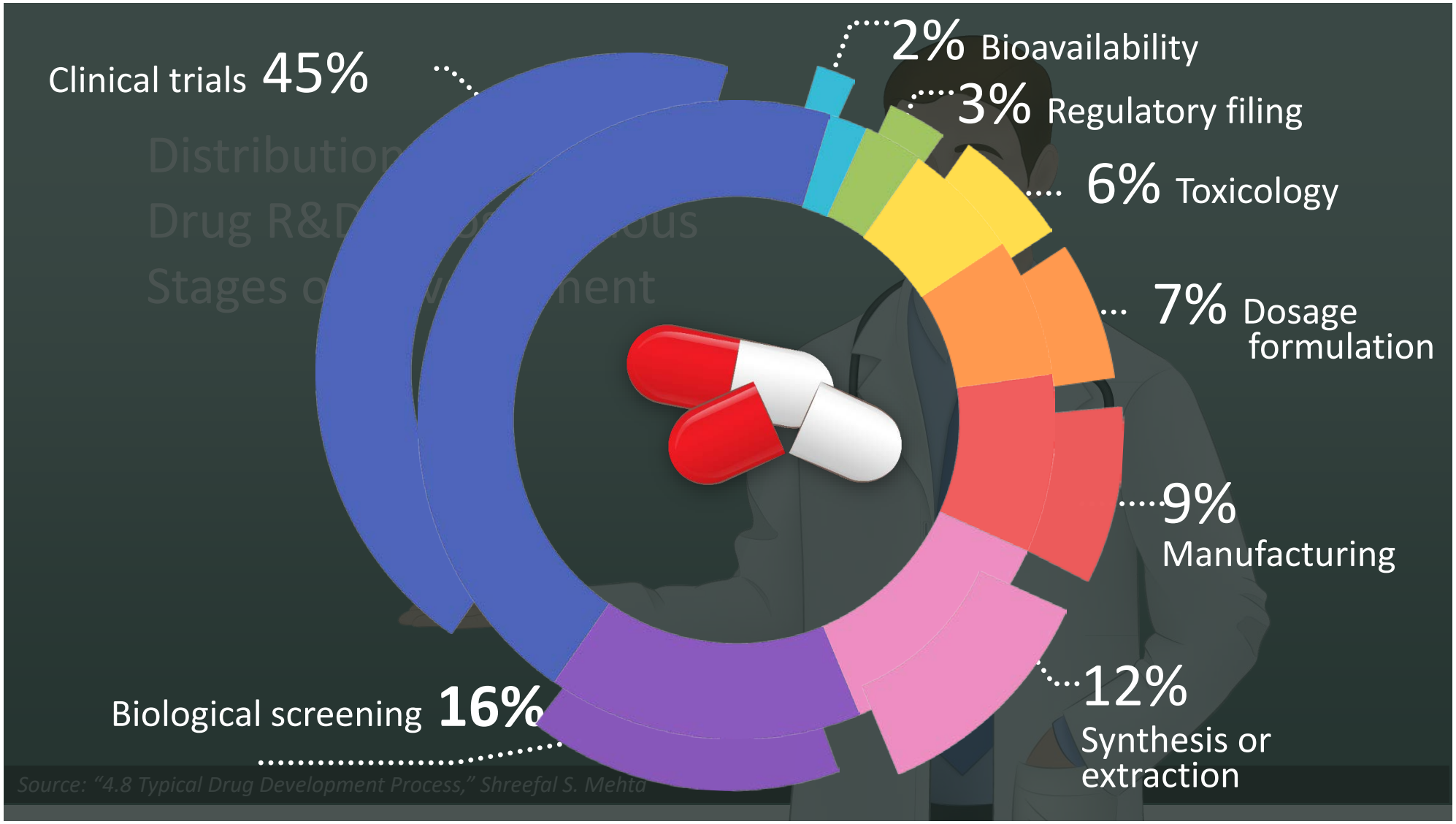

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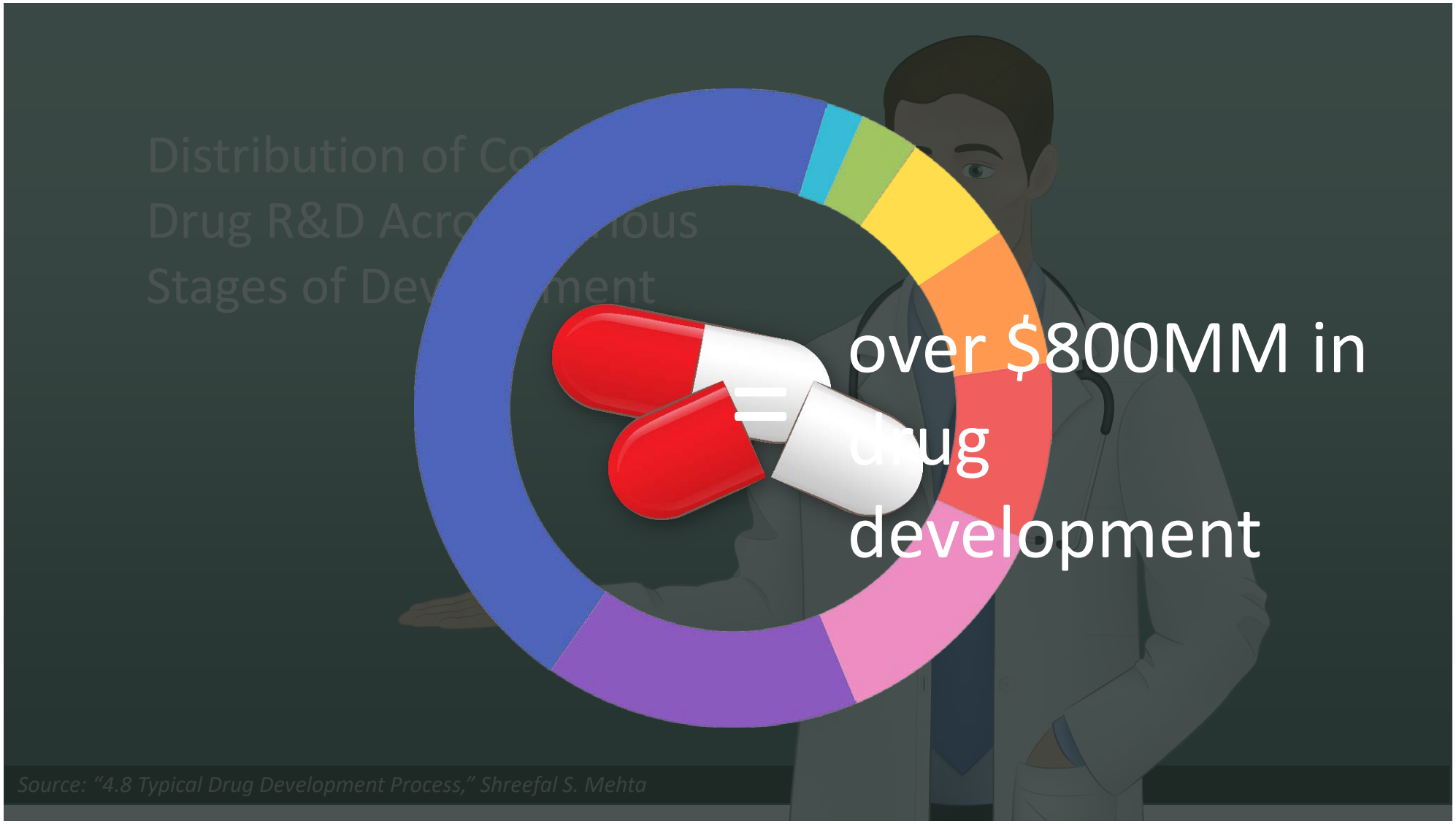

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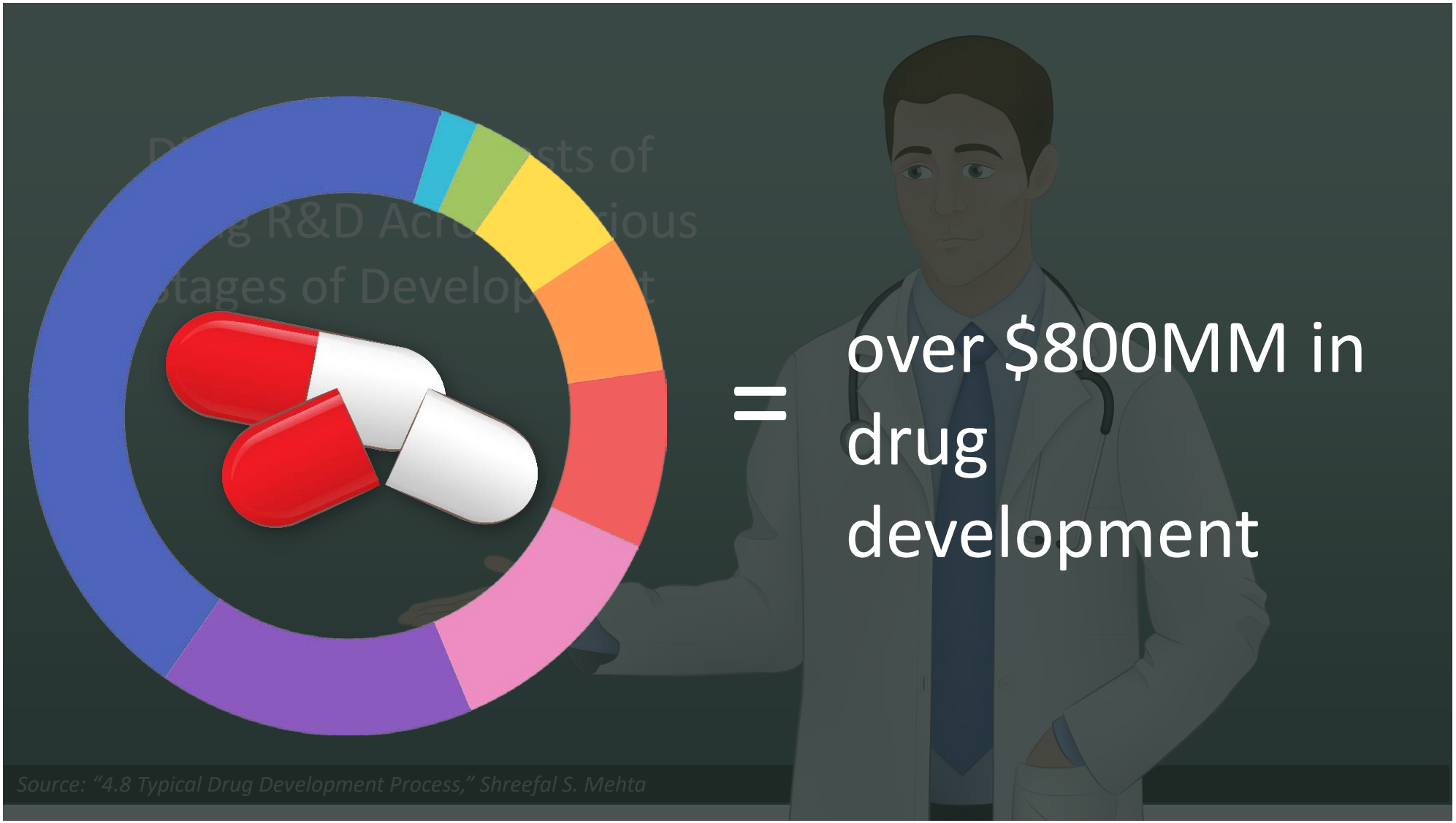

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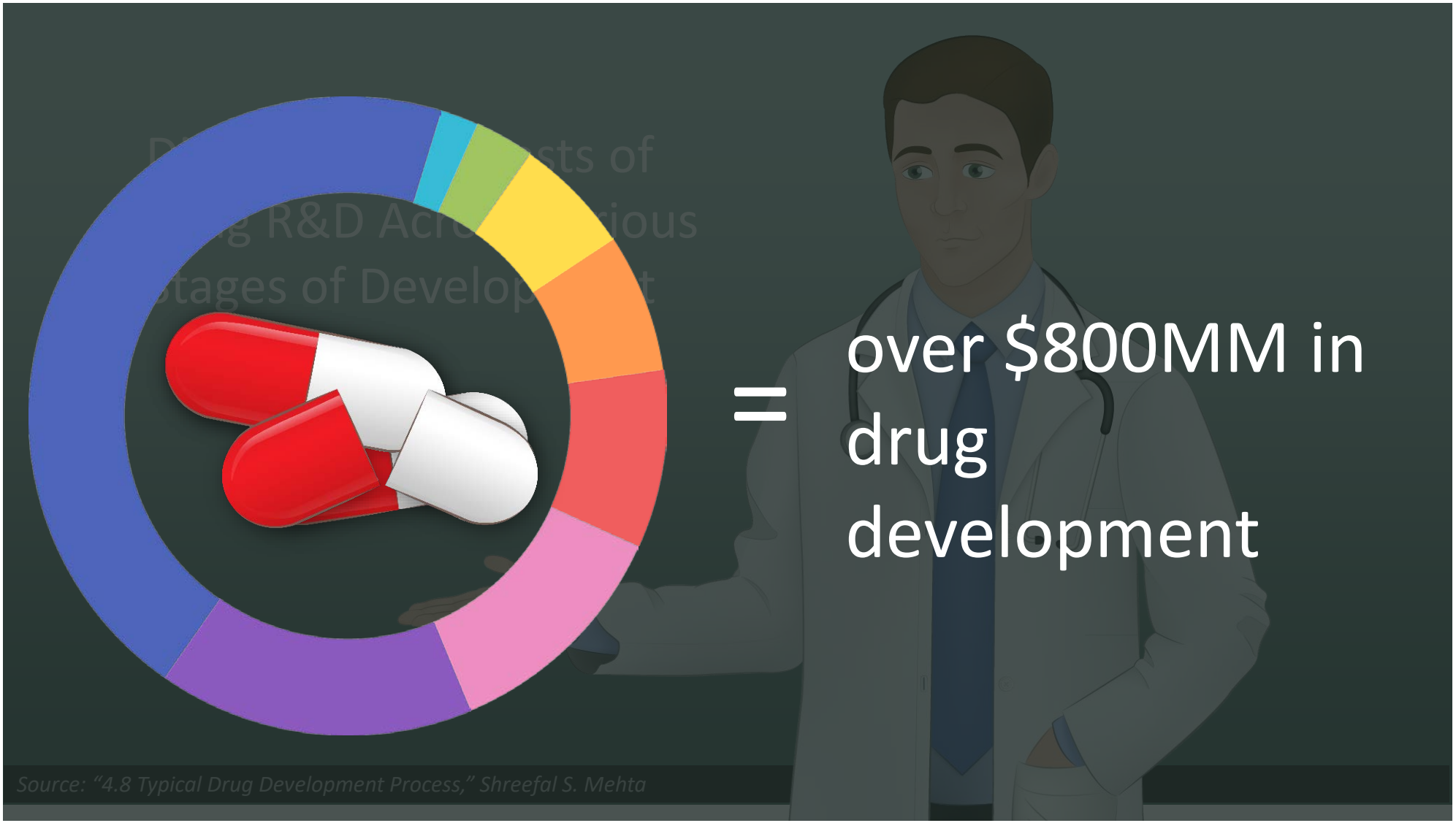

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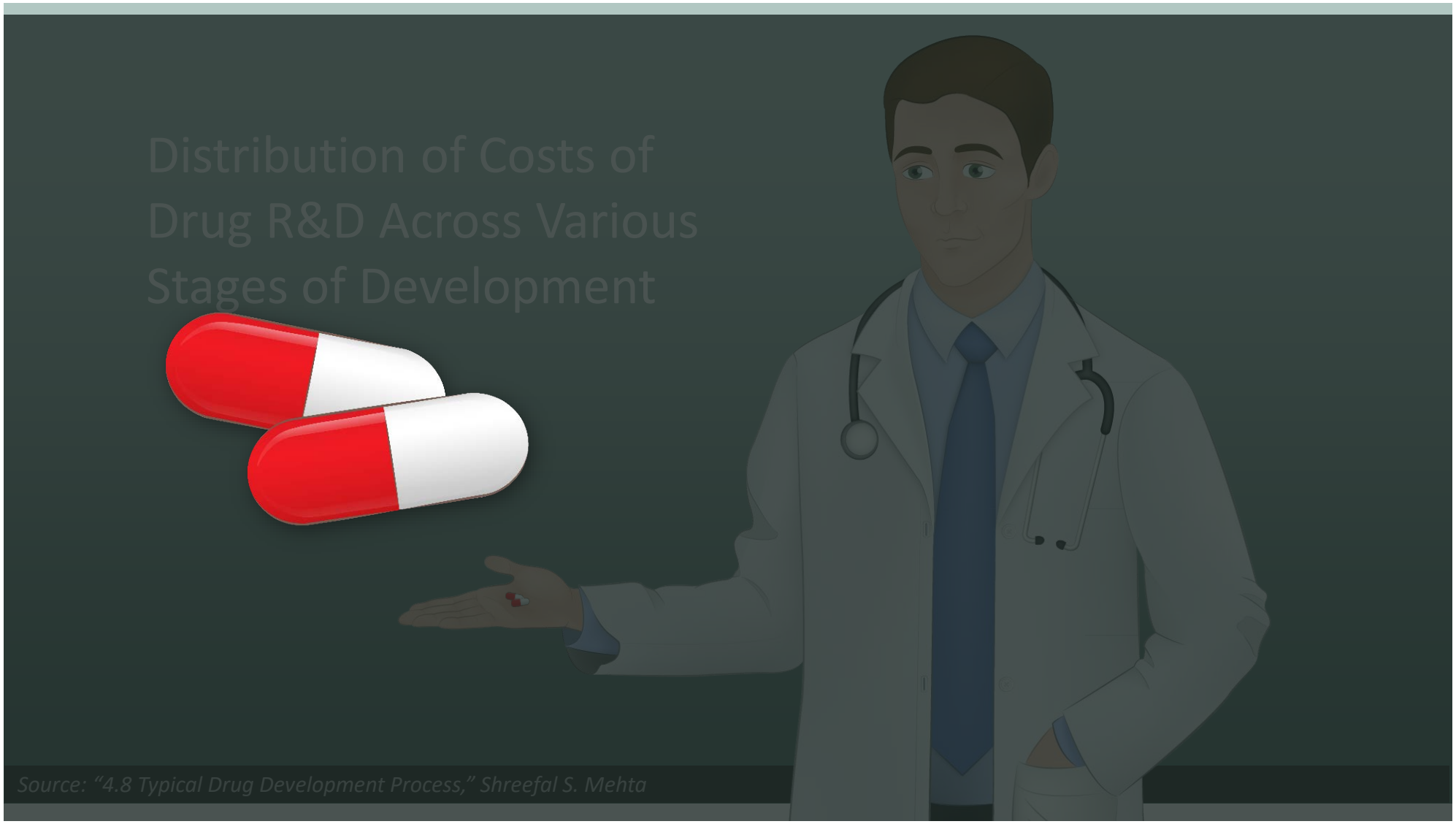

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Can Involve Animation:**

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Can Summarize Deposition Testimony:**

Gates Testimony

8/12/1998

DEPOSITION OF BILL GATES

Job No.:5410

Page 16

1 beneficiary rights -- beneficiary rights, yes. The
2 more concrete issues are the second part beginning from

Q. …and when you said in your June 23, 1996, e-mail, quote, I have two key goals in investing in the apple relationship, closed quote, you were talking about yourself personally; is that correct?

A. Yeah. When I say `investing in the apple relationship,' **that means spending time with apple and growing the relationship**.

Keals Reporting
713.224.6865

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PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Can Summarize The Evidence:**

Statements by Mr. Greenberg

Feb. 1, 1995

Letter from M. R. Greenberg to Terri D. Austin.

July 24, 1996

Greenberg **Speech** at SICO Meeting.

Feb. 17, 1997

Letter from M. R. Greenberg to Terri D. Austin.

Jan 1, 1999

Letter from M. R. Greenberg to Terri D. Austin.

Nov. 29, 2000

Greenberg Speech at SICO Meeting.

Jan. 1, 2001

Letter from M. R. Greenberg to Terri D. Austin.

- **Can Summarize The Evidence:**

Statements by Mr. Greenberg

February 1, 1995

STARR INTERNATIONAL COMPANY, INC.
(INCORPORATED IN PANAMA)
P.O. BOX NO. 152
HAMILTON 5, BERMUDA

February 1, 1995

PRIVATE & CONFIDENTIAL

Ms. Terri D. Austin
AMERICAN INTERNATIONAL GROUP, INC.
70 Pine Street
New York, NY 10270
USA

CONFIDENTIAL AIG TRIAL EXHIBIT 1668 pg 1 of 14 BARCL-009-0001797

PRIVATE & CONFIDENTIAL February 1, 1995

Ms. Terri D. Austin
AMERICAN INTERNATIONAL GROUP, INC.
70 Pine Street
New York, NY 10270
USA

The voting shareholders of SICO, in an extraordinary decision, decided that this large capital value had been created through the outstanding performance on the part of two generations of American International people and it should not be used to enrich the then shareholders but instead preserved to provide incentives for succeeding generations.

Very truly yours,

M. R. Greenberg
Chairman

- **Can Summarize The Evidence:**

Statements by Mr. Greenberg

Greenberg's July 24, 1996 Speech to AIG Employees

- "That amount, I should tell you, is about 120 million dollars, which was, and is a considerable amount of money that went into that **trust . . . we wanted to use that in a plan that would provide for incentives to future generations of managers in the AIG companies, based upon a formula, as to how AIG, itself, did**." (*3:25-4:9)*

- "It's there only, it's there for two purposes. One to be a major shareholder in AIG and the AIG shares that make up this trust**,** so that we would have independence and not be, not fear a hostile takeover . . . . **And second, to have this plan, that I described, that would pay out to the participants**, based upon their participations in SICO, which as you know changes every two years." (*4:21-5:6)*

- "It was, when it was set up, it was designed that we would give you these participations and they'd be held in **trust for you**." (*5:13-16)*

- **Can Summarize The Evidence:**

Statements by Mr. Greenberg

February 17, 1997

STARR INTERNATIONAL COMPANY, INC.
(INCORPORATED IN PANAMA)
P.O. BOX HM 152
HAMILTON HM AX, BERMUDA

February 17, 1997

PRIVATE & CONFIDENTIAL

Ms. Terri D. Austin
A. I. G. Claims Services, Inc.
70 Pine Street 21st Floor
New York
NY 10270
U.S.A.

Dear Ms.

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CONFIDENTIAL AIG TRIAL EXHIBIT 1668 pg 3 of 14 BARCL-014-0001809

PRIVATE & CONFIDENTIAL

February 17, 1997

Ms. Terri D. Austin
A. I. G. Claims Services, Inc.
70 Pine Street 21st Floor
New York
NY 10270
U.S.A.

The voting shareholders of SICO, in an extraordinary decision, decided that this large capital value had been created through the outstanding performance on the part of past generations of American International people and it should not be used to enrich the then shareholders but instead preserved to provide incentives for succeeding generations.

Very truly yours,

M. R. Greenberg
Chairman

PREPARING FOR A CIVIL JURY TRIAL IN THE U.S.

- **Can Summarize The Evidence:**

Statements by Mr. Greenberg

January 1, 1999

STARR INTERNATIONAL COMPANY, INC.
(INCORPORATED IN PANAMA)
P.O. BOX HM 152
HAMILTON HM AX, BERMUDA

January 1, 1999

PRIVATE & CONFIDENTIAL

Ms. Terri D. Austin
AIG Claims Services, Inc.
70 Pine Street - 31st Floor
New York
New York 10270
USA

Dear Ms.

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CONFIDENTIAL AIG TRIAL EXHIBIT 1668 pg 6 of 14 BARCL-006-0000747

PRIVATE & CONFIDENTIAL

January 1, 1999

Ms. Terri D. Austin
AIG Claims Services, Inc.
70 Pine Street - 31st Floor
New York
New York 10270
USA

The voting shareholders of SICO, in an extraordinary decision, decided that this large capital value had been created through the outstanding performance on the part of past generations of American International people and it should not be used to enrich the then shareholders but instead preserved to provide incentives for succeeding generations.

Very truly yours,

M. R. Greenberg
Chairman and Chief Executive Officer

- **Can Summarize The Evidence:**

Statements by Mr. Greenberg

Greenberg's November 29, 2000 Speech to AIG Employees

AIG

- We chose to take the book value of the transaction and put the difference between book value and market value into a **trust for the benefit going forward of ongoing managers and participants that we hoped, we built a plan for**. That difference, at the time, was about a 120 million dollars, roughly, give or take. (*3:13-21)*

- We put these shares in a trust and that trust cannot be broken by anybody; **any future managements cannot break that trust** . . .. We thought about all possibilities going forward and we developed a plan so that we believed it could stay in place and have sufficient share in the trust for a couple of hundred years. **In other words, we were trying to preserve, as much as we could, for ongoing management incentives, for the future**. (*5:6-20)*

- If we do well, then the shares reflect it, and AIG's earnings reflect it, the shares come out of the **trust** account to the shareholder's account. (*7:1-4)*

- **Can Summarize The Evidence:**

Statements by Mr. Greenberg

January 1, 2001

STARR INTERNATIONAL COMPANY, INC.
(INCORPORATED IN PANAMA)
P.O. BOX HM 152
HAMILTON HM AX, BERMUDA

January 1, 2001

PRIVATE & CONFIDENTIAL

Ms. Terri D. Austin
AIG Claims Services, Inc.
70 Pine Street - 22nd Floor
New York, NY 10270
USA

Dear Ms. Austin:

The Directors of Starr International Company, Inc. ("SICO") are pleased to announce the formation of the fourteenth two year Deferred Compensation Profit Participation Plan (the "Plan") for selected employees of the American International Group, Inc. ("AIG") and related family of companies (collectively referred to as "American

CONFIDENTIAL AIG TRIAL EXHIBIT 1668 pg 9 of 14 BARCL-068-0001629

PRIVATE & CONFIDENTIAL January 1, 2001

Ms. Terri D. Austin
AIG Claims Services, Inc.
70 Pine Street - 22nd Floor
New York, NY 10270
USA

The voting shareholders of SICO, in an extraordinary decision, decided that this large capital value had been created through the outstanding performance on the part of past generations of American International Companies people and it should not be used to enrich the then shareholders but instead preserved to provide incentives for succeeding generations.

Very truly yours,

M. R. Greenberg
Chairman

Trial

- **At Trial, The Goal is to Pull All of This Together To Present a Compelling & Comprehensible Narrative**
- **How?**
  - Extensive Preparation in Advance
  - Follow the “Order of Proof”
  - Check Constantly to Ensure You Have What You Need in Evidence
  - Tell a Story
  - Use, Revisit and Emphasize Trial Themes

Trial

- **Use of Witnesses**
  - Order of Witnesses
  - Witness Conduct Around the Courtroom
  - Use of Witnesses & Experts to Teach and Build Credibility – Through Direct Testimony
  - Effective Cross-Examination (using Deposition Testimony to Impeach)
  - Presenting a Compelling & Comprehensible Narrative
- **Evidentiary Issues**
  - Evidence is Key
  - Plan for Admissibility in Advance
  - Be Prepared to Lay Foundation for Admissibility Using a Live Witness

Observations

- **In the U.S., Preparation Wins Trials**
  - Understand Your Case – Themes/Challenges
  - Understand Your Jury
  - Understand Your Evidence
  - Understand Your Witnesses
- **And <u>Then</u> Present a Compelling Story in Court**