

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

JUDITH ROMO, et al.,)	<u>Lead Case</u>
)	Civil Action No. 2: 15-089-DCR
Plaintiffs,)	
)	
V.)	
)	CASE MANAGEMENT ORDER
MCKESSON CORP., et al.,)	No. 6
)	(Abbreviated Deposition Protocol)
Defendants.)	

*** **

Being sufficiently advised, it is hereby

ORDERED that the following Abbreviated Deposition Protocol (“Protocol”) shall be followed in all Phase I plaintiff depositions conducted in the non-MDL propoxyphene litigation currently pending before this Court:

I. SCOPE AND INTENT OF PROTOCOL

This Protocol shall apply to all non-MDL propoxyphene actions currently pending before this Court and consolidated for discovery and other pre-trial purposes under Rule 42(a) of the Federal Rules of Civil Procedure. Unless otherwise ordered, this Protocol will also govern all newly consolidated cases. This Protocol shall apply to the Phase I abbreviated depositions of plaintiffs conducted by defendants. Except as specifically provided, nothing in this Protocol shall modify the plaintiffs’ obligations to provide substantially complete responses to Plaintiff Fact Sheets, including production of documents responsive thereto, or the plaintiffs’ obligations to produce evidence relevant to

cumulative/latent injuries as set forth by this Court in Case Management Orders No. 1 and No. 5.

The intent of these Phase I abbreviated depositions is to provide defendants with a brief, initial opportunity to depose plaintiffs on discrete topics. The abbreviated depositions shall not preclude defendants from taking a full and complete deposition of each plaintiff in Phase II.

II. DEPOSITION PROCEDURES

A. Deponents

1. Plaintiffs' counsel are required to make available for deposition one named plaintiff per claim. The plaintiff deponent should be the ingesting plaintiff, if alive. If the ingesting plaintiff is not alive, then the plaintiff deponent should be the person most knowledgeable about the topics listed in Section IV below and will ordinarily be a plaintiff spouse or closest surviving family member who is named as a plaintiff.

2. Deponents should be scheduled for deposition in pools corresponding to the order in which their case was filed, beginning with those plaintiffs named in the lowest civil action number. Plaintiffs may choose the order in which the plaintiffs within a given case will be deposed. Deponents may be taken out of order by agreement.

3. At the conclusion of Phase I, as to any plaintiff who failed to be slotted for a deposition, submit to a deposition, or produce a knowledgeable deponent during the Phase I period, the Court will issue an order to show cause why that plaintiff's case should not be dismissed for failure to prosecute.

B. Minimum Requirements in Advance of the Deposition

Before a plaintiff's deposition can be scheduled, the plaintiff must have complied with the relevant Case Management Orders by timely providing a substantially complete Plaintiff Fact Sheet, including a physician's statement (if required), and the requisite prima facie proof of injury and ingestion, including pharmacy records, photographs, affidavits, medical records.

C. Deposition Locations

Unless otherwise agreed by all counsel, the depositions shall occur in the following locations: Los Angeles, California; Atlanta, Georgia; New York, New York; and Cincinnati, Ohio. The exact location will be confirmed at the time of scheduling. In the event counsel cannot agree on a central location, they may present such disputes to the Court for resolution.

D. Scheduling and Coordination

1. Depositions will be held five days per week (excluding federal holidays) each week during the 90 day period of Phase I. Depositions may be double-tracked for the convenience of the parties and to comply with the Phase I discovery schedule ordered by the Court in Case Management Order No. 1. The parties may schedule up to eight depositions per day.

2. Counsel shall set aside the following dates for depositions in the designated cities and these will be noted on the Master Deposition Schedule. The intent is that the parties conduct depositions in two cities at a time, rotating on a two-week schedule as agreed by the parties.

If counsel are unable to resolve any disputes regarding the timing and scheduling of depositions after good faith efforts, they may present such disputes to the Court for resolution.

3. Defendants will maintain a Master Deposition Schedule available on [FTP site or extranet] at the start of Phase I with available deposition times and locations. At least twenty one (21) days before the deposition dates listed in the above section, plaintiffs' counsel shall notify defendants' Scheduling Liaisons via e-mail of the names of plaintiffs within the designated pool who will be deposed on the offered dates in the offered locations, and defense Scheduling Liaison will update the Master Deposition Schedule. If plaintiffs' counsel do not intend to schedule any plaintiff for a deposition on a particular date, time and location, plaintiffs' counsel shall promptly notify defendants' counsel via email, and in any event no later than twenty-one (21) days before the designated date, and "none" will be indicated on the Master Deposition Schedule under the relevant date and location. Plaintiffs are responsible for continually reviewing the Master Deposition Schedule to ensure for accuracy and promptly alerting Defendants of any revisions that are needed.

4. A deposition is deemed "scheduled" once it is posted to the Master Deposition Schedule, and subsequent changes will be deemed a cancellation subject to the terms of Section VI below. Plaintiffs should alert the parties' Scheduling Liaison of any necessary cancellation or postponement as soon as possible and in any event within 48 hours of the scheduled deposition, and provide good cause for same. Cancellations and postponements will be rescheduled on the Master Deposition Schedule as soon as possible.

5. Depositions will proceed according to the Federal Rules of Civil Procedure and Local Rules, except as otherwise specified in this Protocol or by express

agreement of the parties. Any agreement among the parties to deviate from the Federal Rules of Civil Procedure, the Local Rules of the Court, or this Protocol must be recorded on the transcript at the time the deposition commences.

E. Timing and Duration of Depositions

1. Generally, depositions are expected to be held on weekdays between the hours of 9:00 a.m. and 6:00 p.m. local time (except no later than 3:00pm on Fridays, unless otherwise agreed) with reasonable breaks, including for lunch. Where necessary to avoid returning the subsequent day, the parties and deponent shall attempt to complete the deposition by extending the adjournment upon agreement. A typical deposition day is as follows, though the schedule may be varied by agreement:

- 9:00 a.m. to 10:30 a.m. – Deposition 1
- 10:30 a.m. to 11:00 a.m. – Morning Break
- 11:00 a.m. to 12:30 p.m. – Deposition 2
- 12:30 p.m. to 1:00 p.m. – Lunch Break
- 1:30 p.m. to 3:00 p.m. – Deposition 3
- 3:00 p.m. to 3:30 p.m. – Afternoon Break
- 3:30 p.m. to 5:00 p.m. – Deposition 4 (except on Fridays)

2. Each deposition shall be limited to ninety (90) minutes, excluding breaks and colloquy by counsel, unless otherwise agreed (either in advance or contemporaneously) by all parties. If the parties are unable to reach an agreement, the issue may be presented to the Court for resolution. The court-reporter service shall maintain a total running time for actual deposition testimony.

F. Notices

1. In lieu of the notice provisions of the Federal Rules of Civil Procedure, Defendants will provide deposition notices through the **[FTP site]** website. Each party's Scheduling Liaison will receive notice via email when a new deposition notice is posted via

FTP. Deposition notices will be posted seven (7) calendar days before the scheduled deposition. The designated lead examiner for each deponent will be responsible for drafting and issuing the deposition notice. One notice is sufficient for all defendants.

2. Each deposition notice shall include the name, address, and telephone number of law firm¹ for the party noticing the deposition; the date, time, and place of the deposition; and a conference call-in number.

3. Any deposition may be videotaped at the request of any party, provided that the deposition notice or subpoena contains or is accompanied by a notice that the deposition will be videotaped. The party requesting the videotaping of the deposition shall bear the expense of the videotaping.

G. Documents

1. It is presumed that a plaintiff's responses to a Plaintiff Fact Sheet, all documents produced by a plaintiff, and plaintiff's complaint may be utilized during the deposition. It is not required that copies of those documents be provided to counsel at the deposition.

2. Additionally, no later than 48 hours prior to the deposition, the deponent shall produce any and all documents and materials reviewed, shown to him/her, or used in preparation for the deposition.

¹ The Court will issue a separate Order addressing *pro hac vice* requirements for individual attorneys at those law firms representing the parties during the depositions.

H. Numbering of Deposition Exhibits

Each document marked for identification at the depositions shall be numbered with a new exhibit number. The court reporter shall be responsible for ensuring that the original of all deposition transcripts, including exhibits, is maintained.

I. Attendance at Depositions

1. Unless otherwise agreed by the parties, depositions may be attended only by the parties, the parties' counsel, court reporters, videographers, and essential members and/or employees from the law firms of counsel of record.

2. To allow counsel who noticed the deposition to make arrangements for adequate deposition space and to notify building security where applicable, all counsel who intend to attend the deposition of a witness should update the Master Deposition Schedule no fewer than five (5) business days prior to the deposition of counsel's intent to attend the deposition, indicating attendance in person or by phone, and identify all other individuals who will attend along with counsel. However, no person will be excluded from the deposition solely for failure to provide notice of attendance.

3. The deponent, counsel defending the deposition, and the lead examiner shall attend the deposition in person. Other parties and counsel may attend telephonically. For those parties attending the deposition telephonically, a call-in number shall be provided on the Master Deposition Schedule. At the outset of the deposition, parties attending via telephone shall identify themselves and whom they represent.

J. Objections

1. Objections shall be limited to “form” and “responsiveness” objections and objections based on privilege. All other objections are preserved until first use of the deposition. There should be no speaking objections.

2. An objection by one party reserves the objection for all parties.

3. Objections as to the admissibility of documents introduced during a deposition are not waived by failure to raise the objection during the deposition, but rather are preserved for later ruling upon timely assertion of the objection by this Court, or by the applicable trial judge.

4. Counsel shall not instruct witnesses not to answer questions, except on the ground of privilege. There will be no conferences between deponents and their counsel when a question is pending except for the purpose of determining whether a privilege or claim of confidentiality should be asserted. If a privilege is claimed, the witness will nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as, the date of the communication, who made the statement, who was present other than counsel, and others to whom the communication was made known.

K. Conduct of Depositions; Lead Examiner

Given the number of parties and counsel involved in the litigation, the defendants should agree and designate one lead examiner (by firm, not necessarily individual name) for each deposition. The defendants should cooperate to ensure that the lead examination responsibilities are rotated fairly so that no single defendant or firm bears a disproportionate burden. The designated lead examiner’s responsibilities will include: noticing the deposition, providing a call-in number, calendaring on the Master Deposition Calendar,

attending the deposition in person, and taking lead on the initial questions. Counsel for defendants shall cooperate so that other counsel have an opportunity to ask questions, if desired, and so that examinations by multiple attorneys do not exceed the allotted time.

L. Court Reporters

1. Defense counsel will cooperate to select and retain the court reporter for each deposition.

2. Prior to the start of Phase I depositions, each party's counsel shall provide the court reporting firm with the name, phone number and email of the party's designated Scheduling Liaison, who will receive confirmations and communications.

3. It shall be the responsibility of the court reporter to upload the transcripts, exhibits, and erratas onto the designated [FTP/extranet] so that all parties shall have access.

III. COSTS

All defendants (who have appeared in the case and against whom the plaintiff deponent has pending claims at the time of the deposition) shall equally share in the cost of the court reporter for that deposition. However, for any party requesting a video deposition, that party shall bear the cost related to the videotaping.

IV. POTENTIAL DEPOSITION TOPICS

Given the limited nature of the depositions, it is anticipated that topics which may be covered during the deposition and to which plaintiffs² should be prepared to respond may include, but not be limited to, the following:

² As used in Section IV, in the case of a propoxyphene-product user who is deceased, the term "plaintiff" includes the deceased individual.

1. Name(s) by which plaintiff has ever been known;
2. Current address and time plaintiff has lived there;
3. All addresses at which the plaintiff resided during a point in time in which the plaintiff ever took a propoxyphene-containing product through the present, and dates at each residence;
4. Relationship to other plaintiffs;
5. Background information, including but not limited to age and occupation;
6. Dates of propoxyphene product use;
7. Last date of propoxyphene product use;
8. Formulation of product used and manufacturer(s) of each product used;
9. Prescribing physician(s) for all propoxyphene-containing products used;
10. State in which prescriptions were written;
11. State in which prescriptions were filled;
12. Reasons/conditions for which propoxyphene products were prescribed;
13. Any date(s) on which plaintiff claims that an injury related to use of a propoxyphene product was diagnosed;
14. Any preexisting medical conditions;
15. Specific type of injury which plaintiff claims was caused by use of a propoxyphene product;
16. Date(s) on which plaintiff received treatment for any injuries plaintiff claims were caused by a propoxyphene product;
17. Any other information contained in Plaintiff's Fact Sheet or documents produced therewith.

V. STANDARD STIPULATION AND ERRATA

The following stipulation will apply to all Phase I depositions taken in these actions and shall be included in each transcript by the court reporter:

Upon completion of the transcription of today's session, the original transcript shall be provided to counsel for the witness [via FTP/extranet] by the court reporter. Counsel shall promptly forward it to the witness for review, correction, and signature under penalty of perjury. The witness and his or her counsel shall have thirty (30) days from the date the final transcript is made available to counsel within which to review, make transcription corrections, sign the errata under penalty of perjury, and return it to the court reporter, who will promptly make it available to all counsel.

If the witness is not represented by counsel, the original transcript will be sent to the witness by the court reporter. After review, correction, and signature, the witness shall return the original transcript to the court reporter within thirty (30) days from the date of receipt. The court reporter will promptly make it available to all counsel.

The court reporter will deposit the original transcript, along with a word index, all exhibits and the errata, in the [online FTP/extranet/depository]. If, for any reason, the original is lost, misplaced, not returned, not signed, or unavailable, a certified copy may be used in its place for all purposes.

VI. FAILURE TO APPEAR; EXCESSIVE CANCELLATIONS

1. Upon notice to the Court that a plaintiff failed to appear at a scheduled deposition, the Court shall issue an order directing such plaintiff to show cause why the plaintiff's case should not be dismissed for failure to prosecute.

2. A plaintiff is permitted to cancel and reschedule his or her deposition once with good cause and upon reasonable notice. A cancellation with less than 48 hours' notice may be deemed a failure to appear. Upon notice to the Court that a plaintiff cancelled his or her scheduled deposition more than once, without agreement of the parties or permission by the Court, the Court shall issue an order directing such plaintiff to show cause why the plaintiff's case should not be dismissed for failure to prosecute.

3. The Court, in its discretion, may award costs incurred as a result of a plaintiff's late cancellation or failure to appear. A plaintiff's claim may be dismissed with prejudice at any time prior to the start of the scheduled deposition without the imposition of costs.

VII. DEPOSITION DISPUTES

Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule, require rescheduling of the deposition, or possibly result in the need to conduct a supplemental deposition, shall be presented to the undersigned by telephone. In the event the undersigned

is not available, all efforts will be made to continue the deposition with full reservation of rights of the interrogation for a ruling at the earliest possible time.

This 26th day of January, 2016.



Signed By:

Danny C. Reeves DCR

United States District Judge