

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

**In Re: National Hockey League
Players' Concussion Injury
Litigation**

MDL No. 14-2551 (SRN)

This Document Relates to All Actions

PRETRIAL ORDER NO. 11

**Deposition Protocol Regarding
Pre-designation of Exhibits**

Charles S. Zimmerman and Brian Gudmundson, Zimmerman Reed, PLLP, 1100 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, for Plaintiffs

Stephen G. Grygiel and William Sinclair, Silverman, Thompson, Slutkin & White, LLC, 201 North Charles Street, Suite 2600, Baltimore, Maryland 21201, for Plaintiffs

Jeffrey D. Bores and Bryan L. Bleichner, Chestnut Cambronne PA, 17 Washington Avenue North, Suite 300, Minneapolis, Minnesota 55401, for Plaintiffs

Stuart Davidson and Mark J. Dearman, Robbins, Geller, Rudman & Dowd, LLP, 120 East Palmetto Park Road, Boca Raton, Florida 33432, for Plaintiffs

Lewis A. Remele and Jeffrey D. Klobucar, Bassford Remele, 33 South Sixth Street, Minneapolis, Minnesota 55402, for Plaintiffs

Thomas Demetrio, William T. Gibbs, Corboy & Demetrio, 33 North Dearborn Street, Chicago, Illinois 60602, for Plaintiffs

Brian D. Penny and Mark S. Goldman, Goldman, Scarlato & Penny PC, 101 East Lancaster Avenue, Suite 204, Wayne, Pennsylvania 19087, for Plaintiffs

Vincent J. Esades and James W. Anderson, Heins Mills & Olson, PLC, 310 Clifton Avenue, Minneapolis, Minnesota 55403, for Plaintiffs

David I. Levine, The Levine Law Firm P.C., 1804 Intracoastal Drive, Fort Lauderdale, Florida 33305, for Plaintiffs

Daniel E. Gustafson, Gustafson Gluek, PLLC, 120 South Sixth Street, Suite 2600, Minneapolis, Minnesota 55402, for Plaintiffs

Thomas J. Byrne and Mel Owens, Namanny, Byrne, & Owens, APC, 2 South Pointe Drive, Lake Forest, California 92630, for Plaintiffs

Michael R. Cashman and Richard M. Hagstrom, Zelle Hofmann Voelbel & Mason LLP, 500 South Washington Avenue, Suite 4000, Minneapolis, Minnesota 55415, for Plaintiffs

Daniel J. Connolly, Joseph M. Price, Linda S. Svitak, and Aaron D. Van Oort, Faegre Baker Daniels, LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402; John H. Beisner and Jessica D. Miller, Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, Northwest, Washington, D.C. 20005-2111; Shepard Goldfein, James A. Keyte, Matthew M. Martino, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, New York 10036; James Baumgarten and Adam M. Lupion, Proskauer Rose LLP, Eleven Times Square, New York, New York 10036, for Defendant

SUSAN RICHARD NELSON, United States District Court Judge

The Judicial Panel on Multidistrict Litigation has transferred actions in the above-captioned matter to this Court for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 as part of nationwide concussion injury litigation involving the National Hockey League. (Transfer Order [Doc. No. 1].)

In their joint Rule 26(f) Report [Doc. No. 50], the parties identified an area of disagreement concerning the pre-designation of deposition exhibits, and requested the Court's resolution. (R. 26(f) Report at 4 [Doc. No. 50].) Defendant proposes that four days prior to any deposition, the examining attorney shall be required to disclose the production number of any document that will be used by the examining attorney during the upcoming deposition. (Proposed Pretrial Order at 3-4 [Doc. No. 50-1].) Plaintiffs

oppose any such requirement, arguing that it invades attorney work product protections. The parties submitted memoranda in support of their respective positions [Doc. Nos. 56 & 60], and the Court entertained oral argument on this issue on December 18, 2014. (Tr. of 12/18/14 Status Conference at 13-35 [Doc. No. 73].) Based on the parties' submissions, argument, and the material in the record, the Court issues this ruling, which supplements the Court's previous ruling on deposition protocol, Pretrial Order No. 6 [Doc. No. 67].

In support of its proposal for the pre-designation of deposition exhibits, Defendant argues that this practice will facilitate efficient and orderly depositions. (Def.'s Position Paper at 1 [Doc. No. 60].) Defendant notes that the Manual for Complex Litigation recognizes that the “[i]nefficient management of documents at a deposition can interfere with the deposition’s proper conduct.” (Id.) (citing Manual for Complex Litigation (Fourth) § 11.451 (2004).) The Manual therefore suggests that courts devise a “discovery plan” to “establish procedures for . . . exchanging in advance all papers about which the examining party intends to question the witness (except those to be used for genuine impeachment).” Id. Defendant notes that this Court has previously required parties to follow similar pre-designation exhibit protocols in MDL litigation, In re Viagra Prods. Liab. Litig., No. 06-MD-1724 (PAM) (D. Minn. Feb. 27, 2007), and in cases involving a great quantity of discovery, Dryer v. National Football League, No. 09-CV-2182 (PAM/SRN) (D. Minn. Dec. 1, 2010). Defendant contends that such a procedure both expedites the deposition process and encourages counsel and witnesses to adequately and efficiently prepare for depositions.

As noted, Plaintiffs oppose the suggested protocol on grounds of attorney work product, arguing that the pre-designation of deposition exhibits unfairly provides the opposing party with a “specific roadmap” of the examining attorney’s deposition strategy. (Pls.’ Position Paper at 5 [Doc. No. 56].) Furthermore, Plaintiffs argue that pre-disclosure of specific exhibits contravenes the purposes of depositions and undermines trial testimony. (Id. at 6.)

The Court finds that the pre-designation of deposition exhibits in complex litigation such as this is a helpful practice, aimed at maximizing the usefulness of limited deposition time and the preparation of the parties by narrowing the scope of potential exhibits. The Court, however, is sensitive to Plaintiffs’ concerns that this practice may provide some insight into protected attorney work product. In order to achieve parity, the Court balances those legitimate concerns against the efficiencies to be gained by narrowing the scope of potential exhibits, ruling as follows:

Deposition Exhibits

Four business days before any party deposition is to take place, the examining attorney must disclose the production numbers of any documents that he or she may use during the upcoming deposition. The examining party shall disclose no more than 500 possible exhibits (an exhibit may contain multiple pages). If a proposed exhibit has not previously been produced, the examining attorney must provide opposing counsel with a copy of the exhibit at least four business days before the deposition is to take place, unless the exhibit is used solely for impeachment purposes.

Dated: February 4, 2015

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge