

**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**

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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