

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431

This Document Relates to All Actions

Pretrial Order No. 63

The parties and lawyers in the MDL Baycol Litigation and in many state court cases have been coordinating discovery efforts and working together to agree to the protocol for the taking of depositions of Bayer representatives in Europe or elsewhere. Members of the Liaison Advisory Committee of this Court have submitted a protocol for inclusion in a pretrial order. This Court has reviewed the proposed protocol and incorporates such protocol herein.

IT IS HEREBY ORDERED:

Plaintiffs and Defendants (the "Parties") have agreed to the following protocol ("Deposition Protocol") for the depositions of Bayer AG witnesses. To the extent that this deposition protocol is inconsistent with Pretrial Order No. 7 in the MDL Proceedings (MDL No. 1431) or the applicable Order in the Philadelphia and California coordinated proceedings, the procedures set forth in this Deposition Protocol shall govern the depositions of the Bayer AG witnesses.

1. Location & Schedule: The depositions will be held at the International Dispute Resolution Center located on Chancery Lane in London, England or at such other location on which the Parties may agree, in

accordance with the schedule agreed to by the Parties.

2. Logistics & Scheduling: The Parties agree to arrange for a room for each deposition that will accommodate approximately 40 to 50 people. Matters of seating arrangement for the witness and counsel shall be decided by agreement of the principal attorney conducting the examination of the witness and counsel for the witness. Two breakout rooms will also be available for each side (that is, plaintiffs' side and defendants' side) to hold private meetings. The depositions will take place in two sessions. The first session will run from February 24, 2003, to March 5, 2003, on a single track ("First Session"). The second session will run from March 24, 2003, to April 5, 2003 on a dual track ("Second Session").

3. Time Allocation, Format and Order of Depositions: Each deposition will take no more than eight and one-half (8 1/2) hours per day commencing at 9:00 a.m. and ending at 5:30 p.m. (GMT), with a (1) one hour lunch break at or around 12:00 noon and breaks totaling about 30 to 45 minutes per day, for a three-day period. The depositions will proceed in the following order and format:

- a. Segment 1: Discovery examination – Plaintiffs Side (8 hours)
- b. Segment 2: Direct examination – Bayer Defendants Side (6 hours)
- c. Segment 3: Further examination – Plaintiffs Side (8 hours)

Segment 1 will commence at 9:00 a.m. on the first day and shall continue until 5:30 p.m. that day as well as for one (1) hour at the beginning of the second day. Segment 2 will commence at the conclusion of Segment 1 and shall proceed no longer than six (6) hours. Segment 3 shall commence at the conclusion of Segment 2 and shall proceed until 5:30 p.m. on the second day and on into the third day for the time remaining from the Plaintiff's Further Examination allotment of time. Out of the time allotted to a Side per segment, each Side may reserve time for examination of a witness at the completion of any segment.

To insure that each deposition adheres to the allotted time, each side may employ no more than two attorneys per examination segment. However, both attorneys will have the right to examine the witness provided that the questioning is not duplicative and that each examining attorney questions the witness only for one period of time during the segment. In the instance where a deposition requires translation for the witness, although the Parties agree to use their best efforts to complete the depositions in accordance with the schedule set forth in Appendix A, the Parties recognize that extra time to complete the deposition may be necessary to compensate for time needed in translation. Accordingly, the Bayer AG witnesses testifying in German will be available for examination, if requested, for one additional day to be scheduled upon mutual agreement of the Parties during the Second Session.

4. Court Reporters: The plaintiffs may choose a certified court reporting service to record each deposition. However, plaintiffs will rotate a different court reporter for each of the two sessions.

The court reporter will utilize a real time transcription displayed on video or computer monitors.

5. Interpreters/Translators: In those instances where a witness chooses to respond to questions in his or her native language (other than English), a neutral translator will be employed to interpret and translate from the foreign language to English. Each translator will swear under oath prior to each deposition to provide honest and truthful translations.

Two translators will be employed for the First Session and three translators for each deposition during the Second Session. The translators will rotate as necessary during the course of the depositions. A monitor displaying “real time” transcription will be placed in front of the translator to assist in the translation. Translators will be compensated on a daily basis for those days spent actually translating. Translators will also be reimbursed for ordinary and necessary expenses.

Defendants and plaintiffs will share the fees and costs of the translators equally.

6. Advance Notice of Documents Used in a Deposition: Each party will provide to the other party advance notice of all German documents each

reasonably anticipates using in an examination (except for impeachment), by serving such documents 72 hours in advance of a deposition. Each party representing a witness will bring to the deposition any document reviewed by the witness in preparation for the deposition. Each party will appoint a liaison to receive such documents.

7. Advance Notice of Language of Witnesses: Defendants will notify plaintiffs of all witnesses who will be deposed in German and therefore, who will require the assistance of translators, no later than February 15, 2003.

8. Objections: All objections shall be reserved for trial, other than objections to the form of the question (which also encompasses leading questions) or responsiveness of the answer. This paragraph is not intended to preclude any party from seeking a ruling in accordance with paragraph 9.

9. Court Intervention to Resolve Disputes: The Honorable Michael Davis or Special Master Roger Haydock or another Master appointed by Judge Davis shall preside at the depositions of the Bayer AG Witnesses and rule on any matters arising at the depositions. The Court will pay its own costs for attending the depositions. The Parties agree to share equally the costs incurred by the Master in attending the depositions.

10. Deposition Notices and Cross Notices: Plaintiffs will notice all depositions and serve such notices on all parties in cases pending in the MDL and the Philadelphia and California coordinated proceedings ("State

Coordinated Proceedings") pursuant to the procedures currently being followed prior to all Baycol AG depositions. Defendants may cross notice depositions in any other cases involving Baycol. The parties agree that the procedures for noticing the depositions of the Bayer AG witnesses shall be in accordance with the procedures used by the MDL and the State Coordinated Proceedings in noticing Bayer Corp. witnesses and that the parties need not institute proceedings under the Hague Convention for the taking of these depositions.

11. Evidentiary Form of Questions: In the event the parties seek to use at any trial the deposition testimony of any witness offering an opinion, the parties agree not to raise at such deposition or trial the objection that the deposition questions asked or the answers given regarding such expert opinion do not conform to the evidentiary form typically required by the jurisdiction whose law would control the case being tried. For example, if one jurisdiction requires an opinion to be expressed to a reasonable degree of certainty, the defendants shall not object to an opinion given to a reasonable degree of probability.

12. Party Liaison: Each party will appoint a liaison to serve at each session of the depositions to ensure proper compliance with the protocol in seeking intervention of the court to assist courts in resolving disputes; to assist with the logistics of the protocol; and, to ensure that decorum is met in the overall deposition process.

13. Telephone Participation: Telephone facilities will be provided so that parties wishing to participate in the depositions by telephone may do so.

14. Good Faith: The parties agree to attempt to resolve all issues arising during the course of the depositions of the Bayer AG witnesses amicably and in good faith.

Date:

Michael J. Davis
United States District Court