

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431  
(MJD/JGL)

This Document Relates to All Actions

Pretrial Order No. 4

---

Having considered the written submission of the parties, the comments and proposals presented at the Initial Conference held March 4, 2002, and §§ 21.1 – 21.223; 41.2 of the *Manual for Complex Litigation (Third)*, IT IS HEREBY ORDERED:

**I. DOCKET AND FILING PROCEDURES**

**A. Master Docket and File.** The clerk will maintain a master docket and case file under the style set forth in Pretrial Order No. 1. All orders, pleadings, motions and other documents will, when filed and docketed in the master case file, be deemed filed and docketed in each individual case to the extent applicable.

**B. Separate Dockets and Files.** The clerk will maintain a separated docket and case file for each case removed or transferred to this Court. Each such case will be assigned a new case number in this Court.

**C. Captions; Separate Filing.** Orders, pleadings, motions and other documents will bear a caption similar to that of this Order. If generally applicable to all consolidated actions, they shall include in their caption the notation that they relate to “ALL CASES” and shall be filed and docketed only in the master file. Documents intended to apply only to particular cases will indicate in their caption the case number of the case(s) to which they apply and will be filed and docketed in the master case file and specified individual case files.

**D. Address; Number of Copies.** When filing documents relating to “ALL CASES” with the Court, one signed original shall be sent to the Clerk, U.S. District Court, District of Minnesota, Suite 202, 300 South 4<sup>th</sup> Street, Minneapolis, MN 55415. When filing documents relating to a particular case or cases, one signed original shall be sent for the Master File and an additional copy for each particular case to which the matter related. For all motions and briefs, send a courtesy copy of the document to Chambers (Suite 14E, U.S. District Court, 300 South 4<sup>th</sup> Street, Minneapolis, MN, 55415), accompanied by a computer-readable disk in WordPerfect or Microsoft Word format. Documents should be stapled once and should not have backing or cover sheets.

**E. Discovery Requests and Responses.** Pursuant to Fed. R. Civ. P. 5(d), discovery requests and responses will not be filed with the Court except when specifically ordered by the Court or to the extent offered in connection with a motion.

## **II. SERVICE OF DOCUMENTS**

**A. Orders.** A copy of each order will be provided electronically and in hard copy to Plaintiffs’ Liaison Counsel and Defendants’ Liaison Counsel for distribution by overnight delivery or facsimile to other counsel and parties.

**B. Pleadings, Motions and Other Documents.** Counsel designated on Attachment A shall be served with each pleading, motion or other document filed by a party by (i) hand delivery, (ii) overnight delivery or (iii) facsimile unless the party has, in writing, refused to accept service by facsimile. In addition, all motions and briefs will be served

(without attachments) upon Lead and Liaison Counsel by electronic mail. Service on Plaintiffs' Liaison Counsel constitutes service on all Plaintiffs' Counsel and Plaintiffs who are unrepresented. Service by Liaison Counsel to other attorneys of record shall be by overnight courier service, facsimile or electronic mail. Alternatively, documents may be served electronically, if the Court later approves such electronic service.

**C. Service of Original Complaints; Amendments Adding Parties.** To eliminate disputes over service of process and reduce the expense of such service, Defendants Bayer Corporation and GlaxoSmithKline have agreed to waive service of process for Baycol-related cases filed in federal court, subject to the provisions of Fed. R. Civ. P. 4(d). The notice required by that rule should be provided to the following representatives of the Defendants:

For Bayer Corporation:

Gary McConnell  
Senior Counsel  
Bayer Corporation  
100 Bayer Road – Omega Building  
Pittsburgh, PA 15205-2000

For GlaxoSmithKline:

Jean Sherwood  
GlaxoSmithKline  
One Franklin Plaza  
Philadelphia, PA 19101

Plaintiffs shall have 30 days after the date of this Order (or, if later, 30 days after the date a case is subsequently filed in, removed to or transferred to this Court) to provide notice pursuant to Rule 4(d) to Defendants.

The parties are continuing to negotiate with respect to service on Bayer A.G. and

GlaxoSmithKline, plc and will report to the Court no later than the next status conference.

### **III. STATUS CONFERENCES**

**A. Regularly Scheduled Conferences.** The Court will convene a status conference in this litigation at 1 p.m. the second Thursday of every month, subject to the Court's calendar. Except in emergencies, motions shall not be brought for hearing at any time other than a regularly scheduled status conference. In order to be heard at a regularly scheduled status conference, motions must be fully briefed at least one week before the conference. Lead and/or Liaison Counsel for the parties shall (i) confer 72 hours prior to each scheduled hearing in an attempt to resolve outstanding disputes and (ii) provide to the Court 48 hours prior to each scheduled hearing a joint letter listing all motions and other matters that the parties anticipate addressing at the hearing. Each party shall endeavor not to notice depositions for days on which status conferences are scheduled, and no deposition shall go forward on such days without prior leave of Court.

**B. Telephonic Conferences.** Telephonic conferences may be conducted at the Courts' discretion by prior arrangement with the Court's chambers, provided that all interested parties are available and receive at least 24 hours notice. The Court may initiate conference calls on procedural or scheduling matters.

### **IV. REFINEMENT OF PLEADINGS AND ISSUES**

**A. General Briefing Requirements.** Briefs in support of, or in opposition to,

any motions may not exceed 30 pages without leave of Court. Reply briefs shall be limited to 15 pages without leave of Court. All briefs shall conform to D. Minn. L. R. 7.1(e). Unless otherwise provided, briefs in response to motions shall be filed 21 days after the date of service. Any replies thereto shall be filed within 15 days after service of the response.

**B. Rule 12 Motions.** As of the date of entry of this Order, no Rule 12 motions are pending with respect to the cases already transferred to this Court. Briefing of any Rule 12 motions will proceed pursuant to the provisions set forth in Paragraph IV.A. of this Order.

**C. Answers.** Each Defendant already served with a complaint that has been transferred to this Court shall have until 45 days from entry of this Order to answer or otherwise plead.

Each Defendant served with a complaint pursuant to Paragraph II.C. of this Order shall have 60 days from the date of notification to answer or otherwise plead.

For complaints subsequently transferred to this Court as to which Plaintiffs do not avail themselves of the provisions of Paragraph II. C., each Defendant shall have 30 days from the date of transfer (the date established in the Conditional Transfer Order issued by the Judicial Panel on Multidistrict Litigation or, where transfer is contested, the date of transfer in any subsequent order from the JPML) to answer or otherwise plead.

**D. Summary Judgment.** Parties may seek early judgment on issues pursuant to Fed. R. Civ. P. 56.

**E. Class Actions.** Plaintiffs will file by May 15, 2002, any motion and supporting brief seeking class certification pursuant to Fed. R. Civ. P. 23. The motion shall

be accompanied, for each named Plaintiff, by a completed Plaintiff Fact Sheet, *see infra*, Part V.D.1, including executed copies of Authorizations for Release of Records, and copies of medical records in the possession of Plaintiff or Plaintiff's counsel, if those documents have not already been supplied to Defendants. Defendants shall file any opposition thereto no later than 90 days after the filing of any class certification motion. During this period, Defendants may conduct class-related discovery. The court will thereafter be requested to set a hearing under Rule 23(c).

## **V. DISCOVERY**

**A. Approval of Expedited Discovery.** Expedited discovery of Plaintiffs and Plaintiffs' health care provider(s) is granted in certain cases where all of the following conditions exist:

1. the Plaintiff or a member of the Plaintiff's family is terminally ill;
2. there is an urgent need to record and preserve the testimony because of the gravity of the illness; and
3. Plaintiff has fully completed the Plaintiff Fact Sheet and provided and fully complied with the execution of the medical authorization as required by the Fact Sheet and Defendants have had an opportunity to conduct reasonable informal discovery prior to the taking of the deposition.

**B. Schedule.** Discovery shall be conducted according to the schedule set forth herein. Orders issued by other courts imposing dates for initiation or completion of discovery are, when a case is removed or transferred to this Court, vacated and replaced

by the schedule provided in this Order.

**C. Initial Disclosures.** The parties have agreed that, in light of the discovery plan set forth herein, the parties are relieved from complying with Fed. R. Civ. P. 26(a).

**D. Initial Written Discovery by Defendants.**

**1. Plaintiff Fact Sheets.** Each Plaintiff whose case already has been transferred to this Court shall have until 45 days from entry of the Order to complete and serve upon Defendants a Plaintiff Fact Sheet and Authorization for Release of Medical Records, in a form to be agreed upon by counsel or to be determined by the Court. Transferred Plaintiffs shall have 60 days from entry of this Order to produce all documents responsive to the document requests contained therein. When Defendants notify the Judicial Panel on Multidistrict Litigation of additional cases for transfer to this Court, Defendants shall serve Plaintiffs in those cases with a copy of this Order. After such cases are transferred to this Court, each Plaintiff shall have 45 days from the date of transfer to complete and serve upon Defendants a Plaintiff Fact Sheet and Authorization for Release of Medical Records and 60 days from the date of transfer to produce all documents responsive to the document requests contained therein. The information contained in the Plaintiff Fact Sheet shall be verified under oath. Plaintiffs' responses shall be treated as answers to interrogatories under Fed. R. Civ. P. 33 and requests for production of documents under Fed. R. Civ. P. 34 and shall be supplemented in accordance with Fed. R. Civ. P. 26.

**2. Additional Written Discovery by Defendants.** Defendants may serve a Master Set of Requests for Production and, subject to Fed. R. Civ. P. 33(a), a

Master Set of Interrogatories on Plaintiffs within 60 days of entry of this Order. Plaintiffs' written responses and/or objections shall be served 30 days after receipt of any such written discovery. Plaintiffs shall produce any requested documents not subject to an objection within 60 days of receipt of Defendants' document requests.

The parties shall meet and confer regarding any objections to discovery. Any party seeking judicial determination with respect to a discovery dispute must certify that the parties have conferred in good faith in an effort to resolve the dispute without court action.

**E. Initial Written Discovery by Plaintiffs.**

**1. Document Requests.** Within 30 days of the entry of this Order, Plaintiffs shall serve upon Defendants a Master Set of Requests for Production of Documents. Any objections to said document requests shall be served (a) within 45 days after receipt of the document requests for Defendants Bayer Corporation and GlaxoSmithKline and (b) within 75 days after receipt for Defendant Bayer A.G. Bayer Corporation will begin producing documents not subject to objection on a rolling basis upon entry of this Order. GlaxoSmithKline will begin producing documents not subject to objection on a rolling basis by April 1, 2002. The parties will meet and confer regarding a schedule for the orderly production of different categories of documents. The parties will seek to coordinate this schedule, with this Court's assistance, with document productions in pending state court proceedings.

The parties shall meet and confer regarding any objections to the document requests. Any party seeking judicial determination with respect to a discovery dispute must certify that the parties have conferred in good faith in an effort to resolve the dispute



without court action.

**(a) Numbering System.** Counsel shall develop and use a system for identifying by unique number or symbol each document produced or referred to during the course of this litigation.

**(b) Document Depository.** All documents disclosed and produced by Defendants pursuant to this Order shall be produced to a document depository to be established by Plaintiffs' Steering Committee.

Reimbursement of incremental expenses related to the maintenance of the document depository may be obtained by imposing user fees. These fees, however, will be kept to the minimum necessary to fund the costs of the depository incurred by reason of this litigation. Any proposal for collection of user fees shall be submitted for approval by this Court.

**(c) Document Preservation.** See Attachment B.

**(d) Confidentiality.** See Attachment C.

**(e) Authentication.** The parties will confer on authentication to resolve any disputes by 60 days prior to the close of discovery.

**2. Interrogatories.** Within 30 days of the entry of this Order, Plaintiffs shall serve upon Defendants a Master Set of Interrogatories subject to Fed. R. Civ. P. 33(a). Defendants' written responses and/or objections shall be served (a) within 45 days after receipt of the interrogatories for Defendants Bayer Corporation and GlaxoSmithKline and (b) within 75 days after receipt for Defendant Bayer A.G. The parties shall meet and confer regarding any objections to interrogatories. Any party seeking

judicial determination with respect to a discovery dispute must certify that the parties have conferred in good faith in an effort to resolve the dispute without court action.

**3. Discovery Directed to GlaxoSmithKline, plc.** GlaxoSmithKline, plc disputes that it can be subject to the jurisdiction of this Court and expects to challenge jurisdiction pursuant to the schedule set for filing Rule 12 motions. In the event that such challenge is unsuccessful, GlaxoSmithKline, plc will commence production of documents and responses to written discovery within 60 days of the order denying GlaxoSmithKline, plc's Motion to Dismiss for lack of jurisdiction.

**F. Requests to Admit.** Parties may serve Requests to Admit upon a party upon completion of document production by that party. No more than 30 Requests to Admit shall be served on any party. Responses shall be served within 45 days.

## **VI. PROCEDURES GOVERNING WRITTEN DISCOVERY**

**A. Coordination of Discovery with Other Courts.** Defendants have agreed to produce in these proceedings all documents and information that they produce in Baycol-related litigation pending in other courts, on the same schedule or as near thereto as is practicable. In return, Plaintiffs have agreed that the sequence in which the documents are produced need not conform to the requirements of Fed. R. Civ. P. 34(b).

**B. Privilege.** A party who, relying on any privilege or the work product doctrine, does not produce all relevant or requested documents in response to a request for production of documents or a subpoena must state that it is invoking a privilege and must specify which privilege or doctrine it is invoking. The parties are to confer to determine the

format and time for production of privilege logs.

Where courts in other jurisdictions have ordered the production of any document initially withheld by a Defendant as privileged or work product, the parties shall either produce the document in these proceedings or timely move for a protective order.

**C. Supplementation of Responses.** Parties will supplement discovery responses as required by Fed. R. Civ. P. 26(e).

**D. Avoidance of Multiple Requests.** Counsel shall coordinate and consolidate their requests for production and examination of documents to eliminate duplicative requests from the same party. No party shall request documents available to it at the document depository or from its own Liaison Counsel, either during the pendency of this MDL or after remand of a case to a transferor district court.

**E. Document Subpoenas to Non-Parties.** Commencing upon entry of this Order, any party may serve subpoenas on non-parties for the production of documents without testimony pursuant to F. R. Civ. P. 45.

**F. Depositions.**

**1. General Procedures.** See Attachment D.

**2. Avoidance of Duplicative Depositions.** As a general rule, no witness should be deposed on the same subject more than once in this litigation. If a party seeks to take a second deposition of a witness, it shall provide the opposing party its basis for an exception to the rule along with a list of the subject matters as to which interrogation is sought. Second depositions on new subject matter shall be permitted by consent of the parties or upon order of this Court authorizing such deposition based upon

a showing of good cause.

**3. Depositions of Defendants.** Rule 30(b)(6) depositions of Defendants concerning the location and preservation of documents may commence April 1, 2002. Depositions of fact witnesses may commence after May 1, 2002.

If Plaintiffs serve prior to May 1, 2002 a notice of deposition for a witness whose documents have not been produced, Defendants shall produce that witness and his or her documents within 60 days of the May 1, 2002 start date for depositions. Thereafter, if Plaintiffs seek to depose a fact witness prior to the production of documents relevant to that witness's interrogation, Plaintiffs shall provide 60 days notice to Defendants and coordinate with Defendants so that necessary documents will be produced prior to the deposition.

**4. Depositions of Plaintiffs.** Depositions of Plaintiffs may commence after April 1, 2002.

**5. Treating Physicians.** Depositions of physicians who have treated Plaintiffs may commence July 1, 2002.

**6. Defendants' Examining or Consulting Physicians.** Depositions of physicians who examine Plaintiffs under Rule 35 on the request of a Defendant or who may otherwise be called by a Defendant to express opinions regarding a Plaintiff's condition ordinarily should be taken after the depositions of the Plaintiff's treating physicians. These depositions may commence September 1, 2002.

**7. Other Witnesses.** The parties will confer to establish a schedule for depositions of other persons.

**VII. ATTORNEYS' TIME AND EXPENSE RECORDS**

All counsel who may seek to recover court-awarded attorneys' fees shall keep a daily record of their time and expenses incurred in connection with this litigation, indicating with specificity the hours, locations and particular activity and shall, by the fifteenth day of each month, submit to Plaintiffs' Lead Counsel a report of their time and expense records for the preceding month.

**VIII. TRIALS**

Plaintiffs will apply to the Court for an early trial date in cases where trial is to be held in the District of Minnesota. Defendants reserve their right to object to any such application.

**IX. GENERAL APPLICABILITY OF ORDERS**

This Order applies to all pending cases and to each subsequently filed case that becomes part of MDL No. 1431. Each subsequent Order entered herein shall also apply to all pending cases and to each subsequently filed case unless said Order provides otherwise.

**X. COMMUNICATION AMONG COUNSEL**

This Court recognizes that cooperation by and among Plaintiffs' counsel and by and among Defendants' counsel is essential for the orderly and expeditious conduct of this litigation. The communication of information among and between Plaintiffs' counsel and among and between Defendants' counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorney's work product, and cooperative efforts contemplated above shall not in any way be used against any Plaintiff by any Defendant or against any Defendant by any Plaintiff. Nothing contained in this paragraph shall be construed to limit the rights of any party or counsel to assert the attorney-client or joint defense privilege or the attorney work-product doctrine.

Dated: March 4, 2002

BY THE COURT:

    //s//    

Michael J. Davis  
United States District Court