

MINUTE ENTRY
FALLON, J.
December 26, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID	:	MDL NO. 1355
PRODUCTS LIABILITY LITIGATION	:	SECTION "L"
.....	:	JUDGE FALLON
	:	JUDGE AFRICK

THIS DOCUMENT RELATES TO ALL CASES:

Before the Court is Defendants' motion to require disclosure of documents ten days prior to depositions. For the following reasons, Defendants' motion is DENIED.

Defendants move for an order requiring ten days advance disclosure of documents upon which deposing counsel plans to question the deponent during a deposition. Defendants support the motion on the grounds of order and efficiency. They also reference a number of cases in which such a procedure has been used successfully as well as comments in the Manual for Complex Litigation which appear to support the concept.

Plaintiffs, however, object to the advanced disclosures because they believe it would result in deposition answers that are, at best, not spontaneous, and at worse, rehearsed or perhaps counsel inspired. Further, Plaintiffs suggest that advanced disclosures reveal the deposing attorney's thinking and strategy which they feel is attorney work product protected from

disclosure.

This issue addresses the Court's discretionary duty to reasonably control the mode as well as the order of interrogating witnesses as set forth in Rule 16 of the Federal Rules of Civil Procedure and Rule 611 of the Federal Rules of Evidence. *See* Fed. R. Civ. P. 16; Fed. R. Evid. 611. Rule 611 states: "The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Fed. R. Evid. 611.

Tension often develops between subdivision one and two of Rule 611(a). In the present case, the Court must consider the advantages and disadvantages of each policy based on the facts and circumstances of this particular case.

In theory, advanced disclosure would promote order and efficiency. Order and efficiency are objectives to be encouraged in all types of litigation, particularly multidistrict litigation. In reality, however, one must question the premise that advance disclosure of documents actually promotes these laudable goals. In an attempt to achieve spontaneity and purity of witness response, while at the same time retain some flexibility in preparing for an interrogation, deposing counsel tend to dramatically overestimate the number of documents that they may use. This practice is usually justified, or at least explained, by an expressed concern that if the documents are not listed, they may not be able to be used during the deposition. Therefore, advance disclosure usually precipitates a plethora of documents that renders any theoretical advantage meaningless by its practical application. The Court further notes that the spontaneity and purity of a witness's response is the foundation or the stylobate upon which the search for truth actually

rests.

Efficiency is important and alluring. History has taught us that there is a certain amount of comfort in having the trains run on time. Yet, the courts must be careful not to seek efficiency without regard to the consequences. The theoretical advantage of prior discussions are outweighed by the practical realities and potentially perilous consequences of endangering unfettered and untutored testimony. Moreover, following the traditional practice for conducting depositions in this particular case should not cause any undue hardship to the Defendants because the documents at issue will be largely produced by the Defendants who probably created or at least assembled them and had access to them for some period of time.

Considering all of the ramifications of this motion and considering the facts and circumstances applicable to this particular case, the Court does not find that a deviation from the time honored practice of producing or using documents at the time they are tendered to the witness is warranted in this case. Accordingly, Defendants' motion is DENIED.