



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 19-C-9000

THIS DOCUMENT APPLIES TO ALL CASES

ORDER APPOINTING DISCOVERY COMMISSIONER

By prior Order, the Court directed the parties to meet and confer, and to submit an agreed upon list of proposed Discovery Commissioners to the Court. Having considered the parties' proposals, the Court hereby appoints the Honorable Christopher C. Wilkes to serve as Discovery Commissioner in the Opioid Litigation, pursuant to Rule 53 of the West Virginia Rules of Civil Procedure and the inherent authority of the of the Court. Rule 53 provides that:

Commissioners in chancery shall henceforth be known as "commissioners." The practice respecting the appointment of such commissioners and references to them, and respecting their powers and duties, and the powers and duties of courts to hold hearings upon their reports, shall be in accordance with the practice heretofore followed in this State. In all other respects, the action in which a commissioner is appointed, is governed by these rules.

The Court **ORDERS** the Discovery Commissioner to proceed with all reasonable diligence.

The Discovery Commissioner's Duties

The Discovery Commissioner shall have the authority to: 1) resolve discovery conflicts; 2) assist with issues raised by electronically stored information, native formats, and meta data; 3) monitor depositions; and 4) resolve privilege issues.

Communications with the Parties and the Court

The Discovery Commissioner may communicate *ex parte* with the Court at his discretion, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. The Discovery Commissioner may communicate *ex parte* with any party or its attorney regarding logistics, including scheduling and other procedural matters, in order to ensure the efficient administration and management of the

litigation. The Discovery Commissioner may not engage in *ex parte* communication with the parties regarding substantive matters.

The Discovery Commissioner's Record

The Discovery Commissioner shall maintain normal billing records of his time spent on this matter, with reasonably detailed descriptions of the activities and matters upon which the Discovery Commissioner has worked. If the Court asks the Discovery Commissioner to submit a formal report or recommendation regarding any matter, the Discovery Commissioner shall submit such report or recommendation in writing for filing on the case docket. The Discovery Commissioner need not preserve for the record any documents created by the Discovery Commissioner that are docketed in this or any other court, nor any documents received by the Discovery Commissioner from counsel or parties in this case.

Review of the Discovery Commissioner's Rulings

The Discovery Commissioner shall either: 1) reduce any formal order, finding, report, ruling, or recommendation to writing and file it electronically on the case docket via File & Serve*Xpress*; or 2) issue any formal order, finding, report, ruling, or recommendation on the record before a court reporter.

Any party may file an objection to an order, finding, report, ruling, or recommendation by the Discovery Commissioner within 7 calendar days of the date it was filed. Failure to meet this deadline results in permanent waiver of any objection to the Discovery Commissioner's orders, findings, reports, rulings, or recommendations. Absent timely objection, the orders, findings, reports, rulings, and recommendations of the Discovery Commissioner shall be deemed approved, accepted, and ordered by the Court, unless the Court expressly provides otherwise.

If the Discovery Commissioner issues an informal ruling or order that is not on the record (such as resolution of a discovery dispute) either orally, via email, or through other writing, and a party wishes to object to that ruling or order, the party shall ask the Discovery Commissioner to formalize the ruling or order by filing it on the docket or appearing before a court reporter. Such request shall be made within 3 calendar days of issuance of the informal order or ruling or the opportunity to object shall be waived. The procedures and deadlines outlined in this section shall then apply.

The Court shall decide *de novo* all objections to conclusions of law made or recommended by the Discovery Commissioner. The Court shall set aside a ruling by the Discovery Commissioner on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Discovery Commissioner enters an order, finding, report, ruling, or recommendation regarding an issue of fact, the Court shall review such issue *de novo*, if any party timely objects pursuant to the Rules and within the 7 calendar day time period set forth herein. Failure to meet this deadline results in permanent waiver of any objection to the Discovery Commissioner's findings of fact.

Compensation of the Discovery Commissioner

The Discovery Commissioner shall be compensated at the rate of \$500.00 per hour, with defendants bearing 50% of this cost and plaintiffs bearing 50% of this cost. The Discovery Commissioner shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this Order, or such other orders as the Court may issue. The Court has considered

the fairness of imposing the likely expenses on the parties and has taken steps to protect against unreasonable expense or delay.

From time to time, on approximately a monthly basis, the Discovery Commissioner shall file an Itemized Statement of fees and expenses (not to include overhead). The Discovery Commissioner shall file with his Itemized Statement a Summary Statement, which shall list only the total amount billed and shall contain a signature line for the Court, accompanied by the statement “approved for disbursement.” If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. The parties shall then remit to the Discovery Commissioner their proportionate share of any court-approved amount, within 20 calendar days of Court approval.

Discovery Commissioner’s Affidavit

This Order shall become effective on the date on which Discovery Commissioner Wilkes files with the Court an affidavit disclosing there is no ground for his disqualification or, if a ground for disqualification is disclosed, that the parties have consented subject to the Court’s approval to waive the disqualification. The Mass Litigation Manager is directed to file Commissioner Wilkes’ affidavit as an exhibit to this Appointment Order.

Cooperation

The parties and their counsel, including their successors in office, agents, and employees, shall provide full cooperation to the Discovery Commissioner, and any staff or consultant employed by the Discovery Commissioner, and observe faithfully the requirements of any orders of the Court and rulings of the Discovery Commissioner. The parties shall timely comply with rulings of the Discovery Commissioner issued pursuant to this Order. The Discovery Commissioner may, if appropriate, impose on a party any non-contempt sanction provided by Rule

37 or 45 of the West Virginia Rules of Civil Procedure, and may recommend a contempt sanction against a party and sanctions against a nonparty. As an agent and officer of the Court, the Discovery Commissioner (and those working at his direction) shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other judicial adjuncts performing similar functions.

Access to Information

The parties will make readily available to the Discovery Commissioner any and all individuals, information, documents, materials, programs, files, databases, services, facilities, and premises under their control that the Discovery Commissioner requires to perform his duties. The parties will make readily available to the Discovery Commissioner any and all facilities, files, databases, computer programs, and documents necessary to fulfill the Discovery Commissioner's functions under this Order.

The Discovery Commissioner may require reports from any party in a format specified by the Discovery Commissioner, as reasonably required to enable the Discovery Commissioner to perform all assigned duties.

A copy of this Order has this day been electronically served on all counsel of record via File & ServeXpress. The Mass Litigation Manager is directed to send a copy of this Order to Discovery Commissioner Wilkes via electronic mail message.

It is so **ORDERED**.

ENTERED: March 17, 2020.

/s/ Alan D. Moats
Lead Presiding Judge
Opioid Litigation