

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**IN RE: WRIGHT MEDICAL
TECHNOLOGY, INC., CONSERVE
HIP IMPLANT PRODUCTS
LIABILITY LITIGATION**

**MDL Docket No. 2329
All Cases**

1:12-md-2329-WSD

ORDER

This matter is before the Court on Plaintiffs' counsel's request to conduct *ex parte* interviews of former employees of Defendant.

The parties agree that American Bar Association Formal Opinion 91-359, which discusses Rule 4.2 of the Model Rules of Professional Conduct, generally provides that counsel for a party may contact the former employees of an opposing party. While *ex parte* contact is allowed, the right to conduct these interviews is not unrestrained. The ABA and the states that have considered this issue have expressed several concerns about *ex parte* contact with former employees, and these concerns have given rise to several contact and interview constraints which define the contours of a party's right to contact former employees. The constraints

are: (i) a former employee who is represented by a lawyer in the matter in which the contact is made may not be interviewed without the consent of the employee's lawyer; (ii) a former employee should not knowingly or inadvertently be asked to disclose privileged information; and (iii) a former employee should not knowingly or inadvertently be asked to disclose information prohibited from disclosure by a confidentiality or other agreement against disclosure of protected or confidential information.

The Court concludes that Plaintiffs are permitted to conduct *ex parte* interviews of former Wright employees. In light of the constraints discussed above, the Court sets out the following procedures that apply to Plaintiffs' interviews of Defendant's former employees. These requirements are imposed to strike the proper balance between the right of Plaintiffs to conduct the interviews, the right of Defendant to protect privileged and confidential information, and the right of an interviewee to understand the purpose of the interview and to thoughtfully consider whether and how to participate in it.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' counsel may conduct *ex parte* interviews of former employees of Defendant in accordance with the following procedures:

1. The interviews shall be conducted by a partner in the law firms serving as Plaintiffs' Lead or Liaison counsel in the litigation. Because of the nature of the protections required to be observed and the nuances that arise in determining if privileged or confidential material might be disclosed in response to a question, seasoned counsel needs to conduct the interviews. One other lawyer or paralegal may also attend the interview.

2. In seeking to schedule an interview, the interviewee shall be advised, in writing, of the following: (i) that an interview is requested; (ii) the identity of the person who will conduct the interview; (iii) that the interview will be conducted by counsel for the plaintiffs in a lawsuit in which Plaintiffs claim that Defendant designed a hip replacement device that was defective and that the defect caused personal injury to Plaintiffs; (iv) that the interview may be conducted at a location chosen by the interviewee; (v) that, if the interviewee has consulted with a lawyer in connection with an alleged defect in hip replacement devices manufactured by Defendant, the interviewee is entitled to have that lawyer present at the interview; and (vi) that it is the interviewee's personal decision whether to be interviewed.

3. At least 96 hours before the interview is conducted, Plaintiffs' counsel shall advise Defendants' counsel of the name of the person or persons to be interviewed to allow Defendant to copy and deliver to Plaintiffs' counsel the

nondisclosure or confidentiality agreement, if any, that each interviewee entered into with Defendant. Each identified agreement must be delivered by Defendant to Plaintiffs' counsel at least 48 hours before the interview. Neither Defendant, its counsel, nor anyone acting on their behalf may contact the disclosed interviewees before they are interviewed, but may contact those interviewed after the interview is concluded.

4. Before questions are asked at an interview, the interviewer shall give to the interviewee a copy of the nondisclosure or confidentiality agreement entered into by the interviewee, and the interviewee shall be given a chance to review the agreement outside of the presence of Plaintiffs' counsel. The interviewee also shall be asked if they need time to contact anyone before the interview commences. If they do, time shall be allowed for the contact to be made. The interviewee also shall be told that if they ever discussed, with a lawyer, including a lawyer on Defendant's legal staff, the design, use or manufacture of Wright hip replacement devices, they should not disclose what was discussed with these lawyers, but that the interviewee may answer any questions using knowledge the interviewee acquired performing their duties for Defendant.¹

¹ Counsel conducting the interviews must be very careful when asking questions to ensure that the interviewees make clear the source of the information they are communicating and to ensure that the interviewees do not disclose discussions with

5. Before the interview begins, the interviewee shall be asked if they agree to be interviewed. If not, the interview shall terminate.

6. After the interview, counsel shall give to the interviewee the business card of the person conducting the interview and the business card of any lawyer or paralegal who also attended the interview.

7. If there is disclosure of actual or potentially privileged material or information that is protected by a nondisclosure or confidentiality agreement, that disclosure should promptly be reported by email to the Court and counsel for Defendant.

SO ORDERED this 17th day of May, 2013.



WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

counsel. Counsel also should be careful not to ask any questions that could cause the interviewees to disclose information that is subject to a nondisclosure or confidentiality agreement.