

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN RE: ETHICON PHYSIOMESH FLEXIBLE COMPOSITE HERNIA MESH PRODUCTS LIABILITY LITIGATION	MDL DOCKET NO. 2782 CIVIL ACTION NO. 1:17-md-02782-RWS
THIS DOCUMENT RELATES TO ALL CASES	

**REVISED ORDER REGARDING COMMUNICATIONS  
WITH PLAINTIFFS' TREATING PHYSICIANS FOR PURPOSES OF  
RETAINING EXPERT WITNESSES**

This case comes before the Court for renewed consideration of Plaintiffs' Motion to Preclude Defendants' Ex Parte Communications with Plaintiffs' Treating Physicians for Purposes of Retaining Expert Witnesses [271] and the Court's prior order regarding same [289]. The Court directed the parties to submit a proposed order to clarify certain language in the prior order. The Court has considered the parties' proposals and briefing and adopts this revised order regarding communications with Plaintiff's treating physicians. This order supplants the Court's prior order regarding this issue [289].

Defendants may have *ex parte* communications with Plaintiffs' treating physicians for purposes of retaining expert witnesses, subject to the following restrictions:

- (1) Defendants and their attorneys shall not use a physician as a retained expert in any case where such physician's current or former patient is a Plaintiff.
- (2) Defendants and their attorneys will not communicate with the physician-expert about any patient of that physician-expert that is a plaintiff in this MDL or any related state court proceeding.
- (3) Defendants and their attorneys shall not use a Plaintiff Fact Sheet or other discovery provided by Plaintiffs to locate or identify an expert for this litigation.
- (4) When contacting a physician who is the current or former physician for any MDL plaintiff for the purpose of retaining the physician as an expert or consultant for Physiomesh litigation or other hernia mesh litigation, Defendants must notify Plaintiffs' Liaison Counsel. Notification will occur after Defendants have performed a logistical outreach to the physician and the physician has agreed to meet with Defendants. In the event the physician is retained as an expert before Defendants learn that he/she is a former or current treating physician of an MDL Plaintiff, such


notification shall be provided after Defendants obtain information identifying the expert as a former or current treating physician of an MDL Plaintiff. Plaintiffs lead counsel will keep confidential the identity of the disclosures made by Defendants (except that disclosure can be made to counsel for the individual plaintiff identified as a patient of the expert). To the extent disclosure is made to counsel for individual plaintiffs in the Physiomesh litigation, counsel for the individual plaintiffs must agree to keep such information confidential before such disclosure is made.

- (5) Defendants shall give the physician a copy of this Order and the accompanying Memorandum to Physicians (attached hereto as Exhibit A) before any material communications take place. In the event the physician is retained as an expert before Defendants learn that he/she is a former or current treating physician of an MDL plaintiff, this Order and the accompanying Memorandum to Physicians (attached hereto as Exhibit A) shall be provided to the expert after Defendants obtain information identifying the expert as a former or current treating physician of an MDL plaintiff.
- (6) Defendants are restricted to 25 *ex parte* contacts. The 25 *ex parte* contact limitation language applies only when contacts are made for the purpose

of retaining or consulting the expert for purposes of Physiomesh litigation – and the physician enters such relationship with Defendants. Thus, if Defendants consulted with or retained the physician in another litigation, that does not count against the 25 *ex parte* contact limitation. Likewise, if a contact is made but the physician declines to be retained or consulted, that would not count against the 25 *ex parte* contact limitation. Defendants may ask for reconsideration on this issue if this limitation becomes a hardship. The parties will meet-and-confer at a future date to discuss how this order will be applied after February 2020 and can raise any issues with the Court if agreement cannot be reached.

- (7) If Plaintiffs believe Defendants have violated their obligations under this Order, they will meet and confer regarding any issues. If the parties are unable to resolve their disagreements informally, these issues may be raised with the Court.

SO ORDERED, this 8<sup>th</sup> day of March, 2019.

  
RICHARD W. STORY  
United States District Judge

# **EXHIBIT A**

## **Memorandum to Doctors**

Physicians may, but are not required to, speak with attorneys in connection with this litigation. Attorneys for Plaintiffs are not limited as to the topics they may discuss with physicians. Attorneys for Defendants are subject to certain limitations when talking with a physician who has treated a plaintiff in the case. Attorneys for Defendants are permitted to retain as expert witnesses physicians who may have treated one or more patients who are Plaintiffs in this litigation. Despite their service as experts, these physicians are still bound by the physician-patient privilege and are forbidden from communicating with Defendants, their employees, and their attorneys about their patients who are Plaintiffs, absent a subpoena, their patients' written authorization, or another order from the Court. Defendants and their representatives must identify which of a physician's patients are Plaintiffs before any substantive communications begin.