

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**CHARLESTON DIVISION**

IN RE: COOK MEDICAL, INC.,  
PELVIC REPAIR SYSTEMS  
PRODUCT LIABILITY LITIGATION

MDL No. 2440

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THIS DOCUMENT RELATES TO ALL CASES

**PRETRIAL ORDER # 46**  
(*Ex parte* Physician Contact by Cook Defendants)

Pending is The Cook Defendants' Motion for Entry of Pretrial Order on Physician Contact. (ECF No. 198). The parties have submitted proposed pretrial orders setting forth guidelines governing the manner in which Defendants Cook Biotech Incorporated, Cook Incorporated, and Cook Medical Incorporated ("Cook") may engage in *ex parte* communications with treating physicians, who are current or former consultants for Cook, or who may be retained to provide expert services on behalf of Cook in this MDL. Having thoroughly considered the proposed guidelines, the court **GRANTS**, in part, and **DENIES**, in part, the Motion. The court grants Cook's request for entry of guidelines, but rejects both proposed versions and instead **ORDERS** as follows:

This Order shall govern *ex parte* communications between Cook and its counsel and former and current treating physicians of Plaintiffs in this multidistrict litigation ("MDL"). For purposes of this Order, a "Consultant" is a physician engaged by Cook to provide services **unrelated** to the MDL or any other product liability lawsuit involving

Cook's Biodesign Products,<sup>1</sup> while an "Expert" is a physician retained by Cook, or on its behalf, specifically to provide litigation-related expert services in the MDL or other product liability lawsuit involving Cook's Biodesign Products, regardless of whether the physician is expected to appear at trial or is specially employed "in anticipation of litigation or to prepare for trial and ... is not expected to be called as a witness at trial." Fed. R. Civ. P. 26(b)(4)(D).

Cook and its counsel shall be permitted to engage in *ex parte* communications with a past or present treating physician of a Plaintiff in this MDL subject to the following restrictions and limitations:

1. Cook and its counsel shall monitor whether the physician has treated any of the Plaintiffs.
2. Cook and its counsel shall not use a treating physician as an Expert in a case in which that physician's former or current patient is a Plaintiff.
3. However, a treating physician who is a Consultant for Cook may testify regarding both his treatment and his consulting services in an action in which his or her patient is a Plaintiff. In that instance, both Plaintiff's counsel and Cook's counsel may meet separately (*ex parte*) with the treating physician/Consultant prior to the deposition, if the treating physician/Consultant agrees to participate in either or both meetings.
4. Cook and its counsel shall not discuss any aspect of the care and treatment of a Plaintiff with the Plaintiff's former or current treating physician, regardless of whether the physician is an Expert or a Consultant.

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<sup>1</sup> For example, services unrelated to litigation would include serving as a faculty member at a Cook-sponsored training session, or performing research and development on Cook's Biodesign Products.

5. Cook shall be precluded from asking a treating physician to provide opinions regarding causation with regard to that physician's own patient/Plaintiff, if the treating physician has been retained as an Expert by Cook. However, this paragraph shall not apply, and Cook shall not be precluded from asking a treating physician to provide opinions regarding causation when those opinions were documented by the treating physician in the patient's medical record before the physician was retained by Cook to act as an Expert.

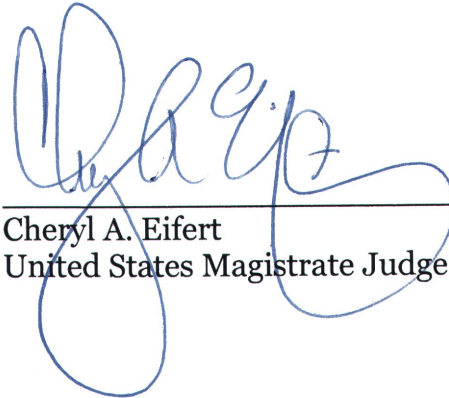
6. Before having a substantive communication with a physician, Cook's counsel will provide the physician with a copy of this Order and will secure the physician's written acknowledgement that he or she has read the attached Memorandum to Physicians, except that an expert retained as of the date of this Order shall be provided with this Order within thirty (30) days, and shall provide written acknowledgement that he or she has read the attached Memorandum to Physicians. (Exhibit A attached hereto).

7. Any objection by a Plaintiff to a particular treating physician acting as an Expert must be made to Cook promptly upon disclosure of the Expert and must be supported by specific reasons.

The court **DIRECTS** the Clerk to file a copy of this order in 2:13-md-2440, and it shall apply to each member related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:14-cv-25192. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the

Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at <http://www.wvsc.uscourts.gov>.

**ENTERED:** September 4, 2014



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Cheryl A. Eifert  
United States Magistrate Judge

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**MEMORANDUM TO PHYSICIANS**

In this multidistrict litigation (“MDL”), Defendants Cook Biotech Incorporated, Cook Incorporated, and Cook Medical Incorporated (collectively “Cook”) have been given permission to communicate with physicians who may be current or former treating physicians of one or more Plaintiffs in the MDL or in similar litigation involving Cook’s Biodesign Products. Specifically, Cook and its counsel are permitted to contact physicians privately, without the knowledge or permission of the Plaintiffs, to discuss (1) consulting services the physicians have provided in the past, or are currently providing to Cook, and (2) to inquire about retaining the physicians to act as experts for Cook in the MDL and other litigation.

However, the permission given to Cook does not change the obligation that a health care provider has to keep patient information confidential. Therefore, Cook and its counsel have been advised that they **shall not** discuss any aspect of the care and treatment of a Plaintiff with that Plaintiff’s former or current treating physician. Before engaging in any substantive discussion with a treating physician, Cook and its counsel

will identify which Plaintiffs are known to be former or current patients of the treating physician. If a treating physician at any time believes that Cook, or any of its counsel or any other representative, is attempting to communicate with the physician about a specific patient's confidential health care information, the physician should immediately notify the patient, and also notify one of the Plaintiffs' MDL counsel listed below:

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228-863-6000

I have read, understand, and agree to be bound by the terms of this memorandum.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name

**EXHIBIT A**