

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE
NEMOURS AND COMPANY C-8
PERSONAL INJURY LITIGATION,

Civil Action 2:13-MD-2433
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

This document relates to: ALL CASES.

DISCOVERY ORDER NO. 7

Permissible Scope of Plaintiffs' Counsel's *Ex Parte* Contact With Treating Physicians

This matter is before the Court on Defendant E. I. du Pont de Nemours and Company's ("DuPont") Motion to Limit *Ex Parte* Communications With Treating Physicians and to Allow Deposition Scheduling Contacts (ECF No. 243), Plaintiffs' Memorandum in Opposition (ECF No. 255), and DuPont's Reply (ECF No. 259.) The Court previously ruled that DuPont's counsel's representatives may contact Plaintiffs' treating physician's offices to schedule and coordinate depositions. This Order addresses DuPont's request for an order precluding Plaintiffs' counsel from *ex parte* communicating with Plaintiffs' treating physicians concerning matters outside the scope of their treatment of Plaintiffs prior to their depositions. For the reasons set forth below, this request is **DENIED**.

DuPont is in the process of scheduling approximately twenty-five depositions of the treating physicians of the discovery pool plaintiffs. According to DuPont, *ex parte* communications between Plaintiffs' counsel and Plaintiffs' treating physicians concerning

matters outside the scope of their treatment of Plaintiffs should be precluded as an improper attempt to color a fact witness's testimony prior to their depositions. DuPont hypothesizes that Plaintiffs will facilitate substantive communications between their physicians and counsel and that counsel will utilize this access to lobby their view of causation. DuPont points out that it cannot access Plaintiffs' treating physicians outside of their depositions and therefore concludes that allowing Plaintiffs' counsel access is unfair. It asks the Court to issue an order limiting *ex parte* discussions between Plaintiffs' counsel and treating physicians in order to "level the playing field." (Dupont's Mot. 6, ECF No. 243.) DuPont emphasizes that it only seeks to limit *ex parte* communications by counsel with Plaintiffs' treating physicians *prior* to the physicians' fact-witness depositions and only on topics beyond care and treatment. In support of its request, DuPont identifies three cases in which the court imposed orders containing the limitations it seeks here.

Plaintiffs oppose DuPont's request. Plaintiffs posit that DuPont's speculative concerns of witness coaching can be alleviated through vigorous cross-examination. Plaintiffs further assert that DuPont's request is "particularly hypocritical," citing DuPont's efforts to lobby doctors during the first phase of the *Leach* class action. (Pls.' Mem. in Opp. 2, ECF No. 255.) Plaintiffs identify cases declining to impose the restrictions DuPont seeks and distinguish the cases upon which DuPont relies. Plaintiffs contend that DuPont's proposed limitations "would burden the patient's ability to investigate her potential case and . . . interfere[] with settlement." (*Id.* at 9.) Plaintiffs further submit that the practical effect of imposing DuPont's proposed limitations would be to "effectively remove[] [treating physicians] from the sphere of expert witnesses upon whom [P]laintiffs can rely" in violation of Plaintiffs' "constitutional rights of access to the courts

and to seek redress for their injuries.” (*Id.* at 14–19.)

Although Plaintiffs’ anticipated parade of horrors appears significantly overblown, the Court declines to impose the limitations on communications between Plaintiffs’ counsel and Plaintiffs’ treating physicians that DuPont seeks. Generally, communications between plaintiffs’ counsel and plaintiffs’ treating physicians are presumably permissible. Ordinarily, then, the Court inquires whether, and to what extent, defense counsel may also engage in *ex parte* communications with the treating physicians. *See, e.g., Strayhorne v. Caruso*, No. 11-15216, 2014 WL 916814, at *3 (E.D. Mich. Mar. 10, 2014) (denying the defendants’ request for order allowing their counsel to have *ex parte* communications with the plaintiff’s treating physicians and rejecting the defendants’ contention that “it is unfair to allow [the] [p]laintiff to talk to [the treating] providers *ex parte* but not [the] [d]efendants”); *Wade v. Vabnick-Wener*, 922 F.Supp.2d 679 (W.D. Tenn. 2010) (analyzing the propriety of defense-counsel access to the plaintiffs’ treating physicians under the Health Insurance Portability and Accountability Act of 1996 and state law); *In re Kugel Mesh Hernia Repair Patch Lit.*, No. 07-1842ML, 2008 WL 2420997, at *1 (D.R.I. Jan. 22, 2008) (rejecting the defendants’ argument that their counsel should be allowed *ex parte* contacts with the plaintiffs’ treating physicians in order to “preserve [the] [d]efendants’ due process rights by leveling the playing field with [the] [p]laintiffs”).

The court in the *Vioxx* MDL did, however, analyze whether the *ex parte* communications between plaintiffs’ counsel and plaintiffs’ treating physicians should be limited. *In re Vioxx Products Liability Litigation*, 230 F.R.D. 473 (E.D. La. 2005). Although the court initially imposed such limitations, it subsequently reconsidered because the “practical effect [of the imposed communication limitations between the plaintiffs’ counsel and the plaintiffs’ treating

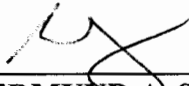
physicians] created unintended consequences that can cause more problems than it sought to solve.” *Id.* at 475. The *Vioxx* Court reasoned, in pertinent part, as follows:

The Court, upon further reflection, now feels that the just option in this case is to protect the relationship between a doctor and patient by restricting defendants from conducting *ex parte* communications with Plaintiffs’ treating physicians but allowing Plaintiffs’ counsel to engage in *ex parte* interviews with those doctors who have not been named as defendants. This approach appears, at first glance, to be one sided and unfair. However, in actuality and as a practical matter, it is not. This modification does not leave the Defendants without any access to information. The Defendants still are entitled to all of the medical records of the Plaintiffs as well as the Plaintiff Profile Forms setting forth each Plaintiff’s detailed medical history. The Defendants can also continue to exercise their right to depose the Plaintiffs’ treating physicians or confer with them in the presence of Plaintiffs’ counsel.

Id. at 477. This Court agrees with the analysis and conclusion of the *Vioxx* Court, that imposition of limitations on the communications between Plaintiffs’ counsel and their clients’ treating physicians is generally not the best course of action. Accordingly, DuPont’s request for an order precluding Plaintiffs’ counsel from *ex parte* communicating with Plaintiffs’ treating physicians is **DENIED**. (ECF No. 243.)

IT IS SO ORDERED.

5-16-2014
DATE



EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE



ELIZABETH A. PRESTON DEAVERS
UNITED STATES MAGISTRATE JUDGE