IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION	§ § § §	MDL Docket No. 3:11-MD-2244-K
This Order Relates To: *ALL CASES*	§ § § §	

ORDER GRANTING PLAINTIFFS' EXECUTIVE COMMITTEE'S MOTION TO MODIFY CASE MANAGEMENT ORDER NO. 5

Before the Court is a Motion to Modify Case Management Order No. 5 ("CMO 5"), Docket No. 520, filed by the Plaintiffs' Executive Committee ("PEC") on behalf of the Plaintiffs' Steering Committee. The PEC requests that a medical records authorization form be modified to expressly prohibit Defendants from accessing Plaintiffs' mental health records without first seeking leave of Court. For the reasons set forth herein, the PEC's request is GRANTED.

I. Factual and Procedural Background

Pursuant to 28 U.S.C. § 1407, the United States Judicial Panel on Multidistrict Litigation ordered coordinated or consolidated pretrial proceedings in this Court of all actions involving the Pinnacle Acetabular Cup System hip implants ("Pinnacle Device") manufactured by Defendant DePuy Orthopaedics, Inc. ("DePuy"). The DePuy Pinnacle multidistrict litigation ("MDL") involves DePuy's

design, development, manufacture, and distribution of the Pinnacle Device. The Pinnacle Device is used to replace diseased hip joints and was intended to remedy conditions such as osteoarthritis, rheumatoid arthritis, avascular necrosis, or fracture, and to provide patients with pain-free natural motion over a longer period of time than other hip replacement devices. Presently there are over eight thousand cases in this MDL involving Pinnacle Devices made with sockets lined with metal, ceramic, or polyethylene. The Plaintiffs in the MDL act through a large group of Plaintiffs' lawyers that form the Plaintiffs' Steering Committee ("PSC"). The PSC is headed by the Plaintiffs' Executive Committee, a small group from the PSC appointed by this Court to conduct discovery and other pretrial proceedings and identify common issues in the MDL.

To facilitate uniformity throughout litigation, the parties proposed CMO 5 by joint agreement. CMO 5 provides governing procedure for various facets of the MDL and includes a medical records authorization form ("authorization" or "release") that Plaintiffs must sign when completing a Plaintiff Fact Sheet. Defendants may then use the authorization to request medical records directly from Plaintiffs' health care providers.

The release, titled "Limited Authorization," provides a bulleted list of the medical records and information Defendants may request from Plaintiffs' health care providers:

- All medical records, including inpatient, outpatient, and emergency room treatment, all clinical charts, reports, documents, correspondence,

test results, statements, questionnaires/histories, office and doctors' handwritten notes, and records received by other physicians. Said medical records shall include all information regarding AIDS and HIV status.

- All autopsy, laboratory, histology, cytology, pathology, radiology, CT Scan, MRI, echocardiogram and cardia catheterization reports.

- All radiology films, mammograms, myelograms, CT scans, photographs, Bone scans, pathology/cytology/histology/autopsy/immunohistochemistry specimens, cardiac catheterization videos/CDs/films/reels, and echocardiogram videos.

- All pharmacy/prescription records, including NDC numbers and drug information handouts/monographs.

- All billing records including all statements, itemized bills, and insurance records.

While the bulleted list does not reference mental health records, the authorization later cautions Plaintiffs that the medical records produced "may [] include information about behavioral or mental health services."

II. The Requested Amendment

The PEC requests CMO 5 be modified to expressly exclude mental health records. Going forward, the PEC suggests that the bulleted list include the following caution: "**IMPORTANT: This authorization does NOT authorize the disclosure of mental health records.**" For those Plaintiffs who executed the original authorizations, the PEC requests that Defendants not request mental health records without first seeking the Court's permission. Likewise, the PEC asks that any requests Defendants send for updated authorizations utilize the new form.

Defendants counter that Plaintiffs fail to show good cause for modifying an agreed upon order, not all states protect mental health records, and that regardless of which state law governs the existence of privilege, mental health records are relevant and discoverable in this litigation.

III. CMO 5 Did Not Expressly Authorize Collection of Mental Health Records

Defendants focus on waiver and assert that a party must typically show good cause to revoke an agreement. However, the Court does not read the PEC's request as rescinding a prior agreement. The "Limited Authorization" does not expressly enumerate mental health records in the list of medical records and information to be provided. Instead, it cautions litigants that the released medical records might include information about their mental health. Such a caution acknowledges a commonsense truth: medical records cannot always be cleanly divided into categories. Hospital charts, surgical notes and routine check-up reports routinely have sections such as "patient history" or "current treatment" that may reference a patient's existing medications, treatment plans, or medical history, all of which could reference information related to a patient's mental health. The current release allows health care providers to release standard medical care documentation without subjectively trying to delineate and redact information that might be categorized as "mental health" information.

This type of authorization is easily distinguishable from Defendants being able to obtain entire files from a mental health provider such as a psychiatrist, counselor, mental health facility or psychologist. The PEC's suggested language merely serves to clarify a disputed ambiguity between the parties on the accessibility of mental health records and information.

IV. Mental Health Records May Be Discoverable

Defendants also posit that mental health records are relevant, and that not all states afford the type of privilege to mental health records that Plaintiffs cite under Texas law. Defendants represent that in some states, mental health records are discoverable based on the claims and defenses currently at issue. The Court addressed this issue as it relates to Texas litigants in its Order regarding the PEC's Motion to Protect the Mental Health Records of bellwether plaintiffs. The Court need not determine the privilege law of every state at this juncture. Instead, Defendants should continue discovery as it has been conducted thus far, gathering only the *medical* records of Plaintiffs. If Defendants think that a certain case implicates a Plaintiff's mental health and that the underlying state privilege law makes it discoverable, Defendants should bring it to the Court's attention.

V. Conclusion

The Court does not find that the authorization needs to be retroactively amended and resigned by all of the Plaintiffs. Instead, going forward, Plaintiffs who have not signed authorizations should use an amended authorization which states, as

reflected in Exhibit A to the PEC's Motion at Docket No. 520, "**IMPORTANT: This authorization does NOT authorize the disclosure of mental health records**." For those Plaintiffs who signed the original authorization, the Court trusts Defendants will honor the Court's ruling and refrain from requesting records from mental health care providers without seeking leave of Court.

SO ORDERED.

Signed January 5th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE