

This Order has been prepared and filed by the Court.

ANNTRINETTE WILSON-JOHNSON,

Plaintiff(s),

v.

ORGANON USA INC., ORGANON
PHARMACEUTICALS USA INC., and
ORGANON INTERNATIONAL INC.,

Defendant(s)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

DOCKET NO. BER-L-597-10

CIVIL ACTION

ORDER

FILED
MAR 29 2012
BRIAN R. MARTINOTTI
J.S.C.

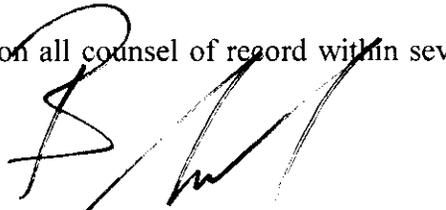
THIS MATTER having been opened to the Court upon the Defendants Organon USA Inc., Organon Pharmaceuticals USA Inc., and Organon International Inc.'s (hereinafter "Defendants") Motion to Compel All Handwritten Forms Used to Complete Plaintiff's Fact Sheet ("PFS");

For the reasons set forth in the accompanying Rider;

IT IS on this 29th day of March, 2012,

ORDERED:

1. Defendants' Motions is DENIED;
2. A copy of this Order shall be served upon all counsel of record within seven (7) days of counsel's receipt thereof.



BRIAN R. MARTINOTTI, J.S.C.



Before this Court is the Defendants' Motion to compel production of the handwritten notes made by plaintiff Wilson-Johnson and provided to her attorneys for inclusion in her Plaintiff Fact Sheet ("PFS").¹ Plaintiff has opposed this motion on the grounds it is privileged by the attorney-client and work-product privileges. The court by e-mail asked Plaintiff to include, in her response, a Certification which addressed and answered the following questions: 1) Did Plaintiff review any handwritten notes and/or her handwritten PFS in preparation of her deposition? and 2) Did Plaintiff sign a Certification that was attached to her handwritten responses to her PFS?

DEFENDANTS' ARGUMENT

Defendants submit that Plaintiff's objections to the production of any handwritten forms on the basis of attorney-client privilege and work-product are without merit. Defendants argue that the forms at issue were not filled out by plaintiff's attorneys, and, therefore do not constitute work-product. Nor are these forms confidential communications made within the context of the relationship between an attorney and his or her client. Rather, these forms are factual information relevant to Plaintiff's claims in this litigation.

Defendants further argue that there is a substantial need for them to review all handwritten forms filled out by Plaintiff and used to complete her PFS. During her deposition, Plaintiff testified that she filled out several forms by hand concerning the type of information contained in her PFS, and that she reviewed these forms the day prior to her deposition. *See* Transcript 54:2-55:16 (Dfs. Ex. B). More importantly, Plaintiff

¹ Defendants were granted leave to file the instant Motion on February 28, 2012 pursuant to Case Management Order 19 at p. 2 ¶2.

testified that she did not know how some information got into the PFS that was produced to Defendants and noted that some information contained therein was incorrect. *Id.* at 71:3-71:14.

Plaintiff filed this suit in August 2010. In that time, virtually all parties have responded to written discovery and there is no reason why Plaintiff should not be in a position to provide additional discovery related to her claims. The scope of discovery in New Jersey, and fundamental fairness, requires that Defendants have all information relevant to Plaintiff's claims.

Accordingly, Defendants submit that the Court should compel production of all handwritten forms Plaintiff submitted to counsel used to complete her PFS and to refresh Plaintiff's recollection prior to her deposition testimony.

PLAINTIFFS' RESPONSE

Plaintiff responds that any documents that include information related to the PFS, sent from Napoli Bern to Ms. Wilson, and subsequently sent back to Napoli Bern, were made in anticipation of this litigation. Clearly, there would be no other purpose for creating such documents.

Moreover, Defendants already have the information they seek in the form of the typed PFS and, therefore, Defendants have no substantial need for these documents. Defendants have failed to specify why they are "entitled" to these unnamed handwritten materials. Although Defendants assert that Plaintiff reviewed these documents prior to her deposition, that contention was clearly rebutted by Plaintiffs' Certification.²

² The Court notes the colloquy of the deposition was unclear as to whether, Plaintiff, prior to her deposition, reviewed the PFS supplied to Defendants and the Court or whether she reviewed her handwritten notes which were used by her counsel to create the PFS. See Plaintiff's Deposition Transcript

Defendants will suffer no undue hardship, prejudice, or surprise from any handwritten forms “containing the kind of information contained in the PFS,” because they are already in possession of Plaintiff’s PFS.

Lastly, under the analysis set forth in *Hannan v. St. Joseph’s Hosp. and Med. Ctr.*, 318 N.J. Super. 22, 26 (App. Div. 1999), and cited by Defendants, Plaintiff has not waived any privilege applicable to these handwritten documents. As indicated above, Plaintiff certified that she did not review any handwritten materials in preparation for deposition. Nor did she use any handwritten materials to refresh her recollection before deposition. Therefore, the work product privilege was not waived. Defendants’ citation to *Hannan*, therefore, is wrong as a matter of fact and law.

DECISION

R. 4:10-2(a) provides, in relevant part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

at 54:15-55:20. Defense counsel has argued that Plaintiff’s counsel’s knows full well that if Plaintiff had reviewed her typed PFS, which was produced to Defendants, there would be no claim of work product privilege. However, Plaintiff’s counsel’s objection to “the production of those handwritten forms” makes clear that the parties were referring to Plaintiff’s handwritten notes.

In this case, Plaintiff has objected to the production of her handwritten PFS on the grounds that it is protected by the attorney-client and work product privileges. The privileges for confidential attorney-client communications and attorney work product are covered generally in *N.J.S.A.* 2A:84A-20 and *N.J.R.E.* 504 (defining the attorney-client privilege to encompass “communications between [a] lawyer and his client in the course of that relationship and in professional confidence”); *K.L. v. Evesham Twp. Bd. of Educ.*, 423 N.J. Super. 337, 354 (App. Div. 2011) (noting that the work product privilege extends to a document “if its use for litigation was the dominant purpose of preparing the document and if the attorney’s belief that litigation would ensue was objectively reasonable”); *see also* *R.* 4:10-2(c) (recognizing the qualified work product privilege).

Clearly, if Plaintiff had reviewed any handwritten notes prior to her deposition, to refresh her recollection, then Defendants would be entitled to review them as well. *See N.J.R.E.* 803(c)(5). However, in her Certification, Plaintiff makes clear that she neither reviewed any handwritten notes prior to her deposition nor signed any Certification as part of her handwritten responses to the PFS. In *Hannan*, “plaintiff’s attorney instructed plaintiff to prepare a chronology of facts relating to his medical treatment. Plaintiff prepared such chronology in the form of notes and forwarded the notes to his attorney.” *Id.* at 28. The Appellate Division held that “the notes, when forwarded to counsel, were clearly communications between lawyer and his client in the course of that relationship.... In addition, such communications carry a presumption of confidentiality.” *Id.* (explaining that the notes were also protected by the work-product privilege because they were “prepared in anticipation of litigation or for trial by or for another party”)

(internal citations omitted). Accordingly, the Appellate Division found that such communications were protected by the attorney-client and work-product privileges.

Understanding that the PFS at issue was prepared and served on Defendants pursuant to Court order, the “communications” at issue in this case are strikingly similar to those in *Hannan*. Accordingly, this Court finds that Plaintiff’s handwritten notes, which formed the basis of her PFS, are clearly “communications between lawyer and his client in the course of that relationship....” *N.J.R.E.* 504; *N.J.S.A.* 2A:84A-20; *Coyle v. Estate of Simon*, 247 N.J. Super. 277, 281 (“[a]t the time they were given, plaintiffs’ written statements to their attorney reciting facts relating to their claims were protected by the attorney-client privilege”); *Macey v. Rollins Envtl Servs. (N.J.), Inc.*, 179 N.J. Super. 535, 540 (App. Div. 1981) (holding that statements prepared by corporate agent at the behest of the corporation’s general counsel were protected by the attorney-client privilege); *Travelers of N.J. v. Gil*, No. A-4085-10T4 (App. Div. March 15, 2012) (finding internal documents protected by work-product and attorney-client privileges); *see also* Biunno, *Current N.J. Rules of Evidence*, Comment 8 to *N.J.R.E.* 504(3) (Gann 1999) (explaining that “communications” of this type carry a presumption of confidentiality). As such, Plaintiff’s notes are protected by the attorney-client privilege. In addition, Plaintiff’s notes were “prepared in anticipation of litigation ... by ... another party,” the plaintiff. *R.* 4:10-2(d). According to plaintiff’s counsel, plaintiff’s notes were prepared at counsel’s behest to better facilitate his representation. *See Roe v. Roe*, 253 N.J. Super. 418 (App. Div. 1992). Therefore, Plaintiff’s notes are also protected by the work-product privilege.³

³ The Court is mindful that Plaintiff, at her deposition, stated that she was uncertain of the information in her PFS. *See* Plaintiff’s Deposition Transcript at 71:3-14. Defendants argue that production of the

Accordingly, Plaintiff is not required to produce her handwritten notes as they are protected by the attorney-client and work-product privileges.

CONCLUSION

For the reasons stated herein, Defendants Motion is DENIED.

handwritten notes is warranted so that they may compare the information contained therein with the information in her PFS. Although Defendants have failed to cite any law in support of this argument, that Plaintiff does not have perfect recollection of her past medical history is insufficient to overcome the attorney-client and work-product privileges. Rather, this is an issue of credibility. Should Defendants wish to further explore any perceived contradictions in Plaintiff's PFS they are free to do so during cross-examination at trial.