IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2:14-mn-02502-RMG** **CASE MANAGEMENT ORDER NO. 36** **This Order relates to case:** **Daniels v. Pfizer, No. 2:14-cv-1400**

I. Pfizer's and McCammon's Motions for Protective Order

Pfizer and non-party deponent Laura McCammon move the Court for a protective order relating to an instruction not to answer at Ms. McCammon's deposition. (Dkt. Nos. 908, 910). Plaintiff filed an opposition, Pfizer and McCammon filed replies, and Plaintiff filed a sur-reply. (Dkt. Nos. 917, 927, 928, 931). For the reasons stated below, the motions are granted.

A. Background

1. Facts

Laura McCammon is a former employee of Pfizer. She was a sales representative that detailed Lipitor to a number of Colorado physicians, including doctors that prescribed the drug to Plaintiff Wilma Daniels (the first case selected for trial in this MDL). Before her deposition, McCammon met with her personal attorney alone and then with her personal attorney and Pfizer's attorney together. At her deposition, Plaintiff's counsel asked, "[a]t the meetings in

which Mr. Mickus [Pfizer's counsel] was present, can you tell me what you discussed with your attorneys?" (McCammon Dep. at 13:12-14).[1]

Mr. Mickus objected on the ground that the attorney-client privilege covers conversations between corporate counsel and a former employee the extent that discussions relate to matters within her scope of employment. (*Id.* at 13:15-22). McCammon's personal attorney instructed her not to answer the question "in as much as it's asking about the discussions that she had in front of Mr. Mickus regarding her employment, but anything else that was discussed, she can – anything else that you discussed with Mr. Mickus, you may certainly tell him about." (*Id.* at 14:5-12). Pfizer's and McCammon's motions for protective order followed, as is required by local rules.

2. The Parties' Positions

The parties agree that the privilege at least applies to communications between corporate counsel and former employees to the extent that the discussions concern information that the employee obtained during the course of employment. (Dkt. No. 908 at 3-4; Dkt. No. 917 at 4; Dkt. No. 931 at 2); *see also Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("Virtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment.").

However, while Plaintiffs "admit that they cannot inquire as to information [McCammon] gave either her attorneys or Mr. Mickus insofar as it relates to her employment," they argue, citing several district court cases in New York, that they can ask McCammon if Mr. Mickus

[1] McCammon's deposition transcript was submitted to the Court in camera. The Court cites to the deposition by page number: line number.

refreshed her recollection, provided her with facts that she did not previously know, or advised her on how to handle certain questions. (Dkt. No. 917 at 4-5).

Interestingly, Plaintiff only cites federal district court cases in New York, applying federal law, in support of her position. The parties vigorously disagree over choice of law, but neither contends that federal law applies. Pfizer contends that Colorado law applies, while Plaintiff argues New York or possibly Ohio law applies. Both parties also argue that choice of law is irrelevant because none of the possibly applicable laws differ. (*See, e.g.*, Dkt. No. 927 at 2; Dkt. No. 931 at 1-2 n.1).

B. Choice of Law

In diversity cases, the scope of the attorney-client privilege is governed by state law. Fed. R. Evid. 501; *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 107 n.1 (4th Cir. 1995). Rule 501 does not state, and there is some debate over, ***which*** state's law applies in analyzing privilege issues: the law of the forum state, the law of the state that provides the substantive law of decision, or law provided by the forum state's choice-of-law analysis. *See In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 76 F.R.D. 47, 53 (W.D. Pa. 1977); David E. Seidelson, The Federal Rules of Evidence: A Few Surprises, 12 Hofstra L. Rev. 453 (1984).

However, the weight of authority appears to hold that a district court should "apply the law of privilege which would be applied by the courts of the state in which it sits." *See Samuelson v. Susen*, 576 F.2d 546, 549 (3d Cir. 1978); *Bell Microproducts, Inc. v. Relational Funding Corp.*, No. 02 C 329, 2002 WL 31133195, at *3 (N.D. Ill. Sept. 25, 2002) ("The majority of circuits apply the privilege law of the state that would be chosen under the choice-of-law rules used by the state where the court sits.") (citing 3 Jack Weinstein & Margaret Berger, Weinstein's Federal Evidence § 501.02[3]); *Metric Constructors, Inc. v. Bank of Tokyo-*

Mitsubishi, Ltd., No. 5:97-CV-369BR1, 1998 WL 1742589, at *1 (E.D.N.C. Sept. 28, 1998) (citing cases); *Abbott Labs. v. Airco, Inc.*, No. 82 C 3292, 1985 WL 3596, at *2 (N.D. Ill. Nov. 4, 1985); *Super Tire Eng'g Co. v. Bandag Inc.*, 562 F. Supp. 439, 440 (E.D. Pa. 1983); *but see Pownell v. Credo Petroleum Corp.*, No. 09-CV-01540-WYD-KLM, 2011 WL 1045418, at *1 (D. Colo. Mar. 17, 2011) ("Colorado courts interpreting Fed.R.Evid. 501 imply that the state law to apply is that which will likely supply the rule by which the case will be resolved.").

In an MDL, the transferee court applies the choice of law rules of the transferor court. *E.g., Sanchez v. Boston Scientific Corp.*, No. 2:12-CV-05762, 2014 WL 202787, at *3 (S.D.W. Va. Jan. 17, 2014); *In re Plumbing Fixtures Litig.*, 342 F. Supp. 756, 758 (J.P.M.L. 1972). Thus, in an MDL, the court applies "the choice of law rules of each of the states where the transferor courts sit to decide which state law provides the attorney-client privilege." *In Re Conagra Peanut Butter Products Liab. Litig.*, No. 1:07 MD 1845 TWT, 2009 WL 799422, at *1 (N.D. Ga. Mar. 24, 2009); *accord In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Products Liab. Litig.*, No. 3:09-MD-02100-DRH, 2011 WL 1375011, at *8 (S.D. Ill. Apr. 12, 2011).

The parties agree that Colorado is the transferor court, Colorado substantive law applies to the *Daniels* case, and Colorado choice of law rules apply in determining which law governs attorney-client privilege claims in this case. (Dkt. No. 917 at 3 n.1; Dkt. No. 927 at 1-2). Colorado has adopted the Restatement (Second) Conflict of Laws for resolving choice of law issues in the context of privileges. *Sec. Serv. Fed. Credit Union v. First Am. Mortgage Funding, LLC*, 861 F. Supp. 2d 1256, 1272 (D. Colo. 2012). Contrary to Plaintiff's assertion, the Restatement does not simply apply the law of the state with the "most significant relationship" to the communication; the Restatement is a bit more nuanced than this. *See* Restatement (Second)

Conflict of Laws § 139 (1971). However, the Restatement only comes into play when the law of the forum state (here, Colorado), and the law of the state with the "most significant relationship with the communication" disagree. *Id.* Because the Court finds that the state law of Colorado, New York and Ohio do not differ on this issue, the Court need not resolve the choice of law issue. *See, e.g, Johnson v. Ford Motor Co.*, No. 3:13-CV-06529, 2015 WL 1650428, at *3 (S.D.W. Va. Apr. 14, 2015) (not resolving the choice of law issue because all the laws were "compatible").

C. Colorado Law

Colorado state courts have held that the United States Supreme Court decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), covers "communications between counsel and former employees of the client which concern activities during their period of employment." *Denver Post Corp. v. Univ. of Colorado*, 739 P.2d 874, 880 (Colo. App. 1987). In *Upjohn*, the Supreme Court held communications privileged where the communications were made by employees, were for the purpose of securing legal advice, and the communications "concerned matters within the scope of the employee's corporate duties." 499 U.S. at 393-94.

The Colorado Supreme Court refined its test for whether the privilege applies between employees and a corporation in *Alliance Const. Solutions, Inc. v. Dep't of Corr.*, 54 P.3d 861 (Colo. 2002), but has not altered the Court of Appeals' holding that this test applies equally to former employees if the communications "concern activities during their period of employment." *Denver Post*, 739 P.2d at 880. Under *Alliance Const. Solutions*, the corporation must establish that (1) the communications were with "an employee, agent, or independent contractor with a significant relationship not only to the [] entity but also to the transaction that is the subject of the [] entity's need for legal services," (2) that "the communication was made for the purpose of

seeking or providing legal assistance," (3) that "the subject matter of the communication was within the scope of the duties provided to the entity by its employee, agent, or independent contractor," and (4) that, if the communication was with an independent contractor, "the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents." *Alliance Const. Solutions, Inc.*, 54 P.3d at 869-70. This Colorado test looks at the ***subject matter*** of the conversation and asks whether that subject matter was within the scope of the employees' duties. Likewise the Denver Post decision holds the same analysis applies as long as communications "concern activities during their period of employment." 739 P.2d at 880. Unlike Plaintiff's proposed test, the Colorado test does not turn on ***when*** the information was obtained or conveyed by counsel.

Plaintiff has not argued that *Alliance* elements are not met or that the discussion with McCammon did not concern activities that took place during her employment. Instead Plaintiff asserts that, in the case of former employees, exceptions exist for certain post-employment flows of information from counsel to the former employee (e.g., counsel informing the witness of facts concerning activities that took place during her employment but relayed *after* she was no longer an employee). However, the Court can find no authority, and Plaintiff has cited none, for the proposition that Colorado recognizes such an exception. Indeed, Colorado has explicitly held that the same test applies to current and former employees as long as the discussion concerns topics that took place while she was an employee. Therefore, the Court finds the conversation privileged under Colorado law.

D. New York Law

The same appears to be true under New York law. State case law holds that a corporation "may avail themselves of the attorney-client privilege for confidential communications with

attorneys relating to their legal matters." *Rossi v. Blue Cross & Blue Shield of Greater New York*, 540 N.E.2d 703, 704-05 (N.Y. 1989). "[A] corporation's attorney-client privilege includes communications with low- and mid-level employees." *Niesig v. Team I*, 558 N.E.2d 1030, 1034 (N.Y. 1990); *accord Radovic v. City of New York*, 642 N.Y.S.2d 1015, 1017 (Sup. Ct. 1996). Unlike Colorado, New York state cases do not make a distinction on whether the conversation at issue was within the scope of the employee's duties, but turn solely on whether the communication aided in the rendering of legal advice or was "legal in character." *See Kenney, Becker, LLP v. Kenney*, 824 N.Y.S.2d 264, 265 (Sup. Ct. App. Div. 2006) (email between former employee and corporate counsel not privileged because it was "not primarily a communication of a legal character between an attorney and client"); *see also Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1060 (1991) ("In order for the privilege to apply, the communication from attorney to client must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.").

The Court has only found two New York decisions regarding former employees. In the first, referenced above, the court conducted an in camera review of an email between a former employee and corporate counsel and held that the email was not privileged because it was "not primarily a communication of a legal character between an attorney and client." *Kenney*, 824 N.Y.S.2d at 264. Its analysis did not differ from cases where the individual was a current employee, and the decision did not consider or turn on whether this communication concerned information obtained post-employment.

In the second case, *Radovic v. City of New York*, 642 N.Y.S.2d 1015 (Sup. Ct. 1996), the former employee was still employed by the defendant at the time of his deposition in the case and represented by defense counsel at the deposition. However, the employee left the entity

before trial, and defense counsel prepped the now former employee for his testimony at trial. The court held that the privilege attached during the witness' employment and that "[t]he termination of the employment relationship did not dissolve the attorney-client privilege, which forever protects the client, here Defendant City, from disclosure against its will of protected communications between a former employee and Defendant City"s attorneys." *Id.* at 1017.

The court explicitly held that, "***it is of no consequence*** that Plaintiff's counsel wanted to inquire about discussions between the attorneys for Defendant City and the former employee ***which took place after his employment relationship with Defendant City ended***." *Id.* (emphasis added). The court held that trial preparation discussions were privileged despite the fact that the witness was no longer an employee. *Id.* Thus, even post-employment flows of information from counsel to former employee were held to be protected. The court did not make exceptions for the refreshing of recollection, advising the former employee of additional facts, or advising the former employee how to handle specific questions at trial. While this is a trial court decision, it is the best indication this Court has as to how higher New York courts might rule on the issue.

Plaintiff has cited no authority supporting their assertion that, under New York law, the privilege does not extend to discussions with a former employee that go beyond her personal knowledge at the time of her employment. The Court has found no authority for such a proposition, and the case discussed above appears to contradict such a proposition. New York law appears to only look at whether the communication facilitated the rendering of legal advice or services to the corporate client. Thus, the Court finds that the discussions are privileged under New York law.

E. Ohio Law

"In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law." *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 824 N.E.2d 990, 994 (Ohio 2005). "R .C. 2317.021 extends attorney-client privilege to firms, partnerships, or corporations as clients." *Shaffer v. OhioHealth Corp.*, 2004-Ohio-63, ¶ 10, 2004 WL 35725 at *3 (Ohio Ct. App. 2004). "Because that section defines a client as a corporation that 'communicates, either directly or through an agent, employee, or other representative, with' an attorney, the statute acknowledges that corporations or companies, as legal entities, can only communicate with counsel through their employees or agents. *Id.*

The Ohio Court of Appeals has explicitly held that "R.C. 2317.02 and *Upjohn Co. v. United States* (1981), 449 U.S. 383, clearly indicate that appellee can assert the attorney-client privilege as to communications between the appellee's former employee and the appellee's attorneys." *Mickel v. Huntington Bank of Toledo*, No. L-82-099, 1982 WL 6496, at *2 (Ohio Ct. App. July 2, 1982). While the Ohio courts have not expounded upon this statement any further, it appears that, like the Fourth Circuit and Colorado, Ohio law applies *Upjohn* equally to former employees. *See In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997) ("[T]he analysis applied by the Supreme Court in *Upjohn* to determine which employees fall within the scope of the privilege **applies equally to former employees**.") (emphasis added).

By contrast, the district courts in New York, on which Plaintiff relies, explicitly hold to the contrary: "even those courts in this Circuit that have extended the privilege to cover some communications with former employees have noted that former employees should ***not*** be treated as if they were current employees in determining the applicability of *Upjohn* and privilege." *In re Refco Inc. Sec. Litig.*, No. 08 CIV. 3065 JSR, 2012 WL 678139, at *2 (S.D.N.Y. Feb. 28,

2012) (emphasis added). The Court does not consider federal case law from district courts in New York persuasive when those courts explicitly apply a standard for former employees that differs from Fourth Circuit law.

In *Upjohn*, the Supreme Court held communications privileged where they were made by employees, in order for the corporation to secure legal advice, and the communications "concerned matters within the scope of the employee's corporate duties." 499 U.S. at 393-94. Thus, the test in Ohio (and the Fourth Circuit) is whether the communications concerned matters within the scope of the employee's duties, not when the information was obtained or relayed. Even if counsel conveyed facts to Ms. McCammon that she did not previously know, they would be privileged as long as the subject matter of the discussion was within the scope of her duties. Therefore, the Court finds the communication privileged under Ohio law. As the communication is privileged under Colorado, New York, and Ohio law, the Court need not determine which law applies. The Court grants Pfizer's and McCammon's motion for protective order.

II. Plaintiff's Motion to Compel

Plaintiff moves for an order compelling Pfizer to identify by Bates number the documetns that Pfizer provided to McCammon's attorney. (Dkt. No. 917). For the reasons stated below, the motion is denied.

A. Background

Before McCammon' s deposition, Pfizer sent McCammon's personal counsel some "general Lipitor sales and marketing documents." (Dkt. No. 928 at 3). These documents have been produced in this litigation to Plaintiffs. (Dkt. No. 927 at 5). McCammon's counsel "selected a few documents to show her in preparation for her deposition." (McCammon Dep. at 27:8-9). After an agreement that it would not waive any privilege, counsel instructed

McCammon that she could answer Plaintiff's counsel's question about what documents she reviewed in preparation for her deposition. McCammon testified that she reviewed the documents that Plaintiff indicated might be used at the deposition. (*Id.* at 28:1-4). The only other document that McCammon could recall was a "frequently-asked-question document" about Lipitor. (*Id.* at 28:22-23, 29:12-13).

Plaintiff moves to compel Pfizer to provide it with the Bates numbers of the documents it gave to McCammon's counsel. Plaintiff agree that this information is work product but contend that it satisfies Rule 26's "substantial need" exception. (Dkt. No. 931 at 3). Plaintiffs argue that because Pfizer was unable to locate a custodial file for McCammon, these documents should serve as a substitute. Plaintiff argues that "[c]learly, Pfizer has information about the kinds of documents that would have been available to McCammon and would have been in her custodial file, and has made use of this information to select pertinent documents." (Dkt. No. 931 at 3-4). However, Pfizer represents that

> The documents have no relation to the custodial file of Ms. McCammon, which Pfizer has not been able to locate. Plaintiffs' speculation that documents provided to Mr. Cohen were essentially a recreation of the missing custodial file is erroneous and unfounded.

(Dkt. No. 927 at 5). Ms. McCammon's attorney represents that none of the documents that he showed McCammon "even contained Ms. McCammon's name." (Dkt. No. 928 at 3).

B. Discussion

As an initial matter, Plaintiff is not entitled to have Pfizer sort, group, and identify documents by employee. Under Rule 34, Pfizer must produce the documents "as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Fed. R. Civ. P. 34(b)(2)(E). Thus, if Pfizer produced the documents as they are kept in the usual course of business, they have met their obligations. The Court has no indication

that Pfizer has not complied with its obligations under Rule 34. Counsel represents that these are general marketing documents and have no relation to the custodial file of Ms. McCammon. Pfizer presumably produced the documents with other marketing documents as they are usually kept.[2]

Second, the Court finds that Plaintiff has failed to make the required showing under Rule 26 for the production of protected work product material. The work product doctrine consists of both fact work product and opinion work product. *See In re Grand Jury Proceedings #5 Empaneled January 28, 2004*, 401 F.3d 247, 250 (4th Cir. 2005). Fact work product "consists of documents prepared by an attorney that do not contain the attorney's mental impressions" and "can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship." *Id.* (citations and internal quotations omitted); *see also* Fed. R. Civ. P. 26(b)(3)(A). To determine whether a party has demonstrated "substantial need" for certain documents, courts must consider "their relevance and importance and the availability of the facts from other sources." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 985 (4th Cir. 1992).

Opinion work product "contain[s] the fruit of an attorney's mental processes" and is "more scrupulously protected as it represents the actual thoughts and impressions of the attorney." *Id.* "[O]pinion work product enjoys a nearly absolute immunity and can be

[2] To the extent Plaintiff assumes Pfizer has essentially recreated a custodial file for Ms. McCammon, the Court finds no evidence to support this assumption. Counsel has represented that these documents "have no relation to the custodial file of Ms. McCammon." (Dkt. No. 927 at 5). The Court declines Plaintiff's invitation to assume that counsel's representation to this Court, as an officer of this Court, is false. *See, e.g., S.E.C. v. Dowdell*, 175 F. Supp. 2d 850, 853 (W.D. Va. 2001) ("The court . . . shall accept the representations of defense counsel, as an officer of the court . . .).

discovered only in very rare and extraordinary circumstances." *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *see also* Fed. R. Civ. P. 26(b)(3)(B).

Importantly, Plaintiff has the documents at issue. The only information that she is missing, and the only information that she seeks, is which of the documents Pfizer's counsel thought relevant to the deposition or helpful background for Mr. Cohen. This information is arguably opinion work product. However, even assuming that it is fact work product, Plaintiff has not shown any substantial need for this information. This information is not witness statements, relevant documents, or facts pertaining to the case, only counsel's opinion as to which documents maybe relevant to a particular witness's deposition or might be helpful background for a witness's attorney. Plaintiff has no need for the opinions of Pfizer's counsel to prosecute her case.[3] Therefore, Plaintiff's motion to compel is denied.

III. Conclusion

For the reasons stated above, Pfizer's motion for protective order (Dkt. No. 908) is **GRANTED**, McCammon's motion for protective order (Dkt. No. 910) is **GRANTED**, and Plaintiff's motion to compel (Dkt. No. 917) is **DENIED**.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

July 13, 2015
Charleston, South Carolina

[3] To the extent Plaintiff complains that Pfizer has produced "nearly 12 million pages" in this litigation, (Dkt. No. 917 at 7), the Court notes that much of that production was the result of the Court granting Plaintiffs' motions to compel.