

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

JOHN W. FERRON,	:	
	:	
Plaintiff,	:	Civil Action No. 2:06-cv-322
	:	
vs.	:	Judge Frost
	:	
VC E-COMMERCE SOLUTIONS, INC., <i>et</i>	:	Magistrate Judge Abel
<i>al.</i> ,	:	
	:	
Defendants.	:	

**PLAINTIFF JOHN W. FERRON’S MEMORANDUM IN RESPONSE TO  
“DEFENDANT VC E-COMMERCE SOLUTIONS INC.’S MOTION  
CONCERNING APPLICATION OF THE SPOUSAL PRIVILEGE TO  
DOCUMENTS AND TESTIMONY SOUGHT FROM LEAH FERRON”**

PLAINTIFF JOHN W. FERRON, by and through undersigned counsel, hereby respectfully submits his Memorandum in Response to “Defendant VC E-Commerce Solutions Inc.’s Motion Concerning Application of the Spousal Privilege to Documents and Testimony Sought from Leah Ferron” (hereinafter “Defendant’s Motion”)(Document No.109).

**I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY**

This case arises from Plaintiff’s claims against Defendants VC E-Commerce Solutions, Inc. (“VC”) and OptInRealBig.com, LLC and an unspecified number of “Doe” Defendants for sending commercial email messages to Plaintiff, which violate the Ohio Consumer Sales Practices Act (“CSPA”), R.C. §1345.01, *et seq.*, and its corresponding advertising regulations, in multiple ways.

On June 28, 2007, VC issued a subpoena to Plaintiff’s wife, Leah Ferron, which commanded Mrs. Ferron to appear for a deposition and produce documents. (Document No. 96) Mrs. Ferron is employed full-time with Plaintiff’s law firm, Ferron & Associates, LPA, as its

office manager and paralegal. Because VC's contemplated discovery from Mrs. Ferron implicates multiple issues of privilege, Mrs. Ferron formally objected to VC's subpoena on July 12, 2007. (See "Non-Party Leah Ferron's Objections to Defendant VC E-Commerce Solutions, Inc.'s June 28, 2007 Subpoena," attached hereto at Attachment 1.)

Thereafter, on August 29, 2007, the Court held a discovery conference during which various discovery issues were addressed, including the Subpoena that VC issued to Mrs. Ferron on June 28, 2007. During that conference the Court directed the parties to submit written briefs regarding the applicability of the *spousal privilege* to Mrs. Ferron's deposition. (Document No. 106 at ¶21) No specific direction was given by the Court as to the application of the attorney-client privilege to communications between Mr. Ferron and Mrs. Ferron in her capacity as an employee of the law firm representing him in this matter.

Accordingly, VC submitted Defendant's Motion on September 21, 2007 (Document No. 109), along with a "Proposed Order Granting Defendant VC E-Commerce Solutions, Inc.'s Motion Concerning Application of the Spousal Privilege to Documents and Testimony Sought from Leah Ferron" ("VC's Proposed Order")(Document No. 109-2).

VC's Proposed Order suggests that the Court adopt the following parameters regarding Mrs. Ferron's deposition: "Ms. Ferron may not assert the privilege to shield testimony about: (1) communications or acts of a routine, non-confidential nature; (2) communications or acts disclosed to third parties; (3) business communications, including any communications made with Ms. Ferron in her capacity as office manager or paralegal for Ferron Associates; or (4) observations or impressions of Mr. Ferron or his activities. In addition, Ms. Ferron may not withhold any written communication or document on grounds of marital privilege." (Document No. 109-2)

Plaintiff does not oppose VC's Proposed Order with respect to paragraphs (1) and (4). However, Plaintiff opposes VC's Proposed Order regarding paragraphs (2) and (3) because these categories of information seek information protected by the attorney-client privilege. While Plaintiff is mindful that the Court requested written briefs only as to the spousal privilege issue, a discussion of the attorney-client privilege is unavoidable due to Mrs. Ferron's employment with Plaintiff's law firm, Ferron & Associates, LPA, and Defendant's proposed scope of Mrs. Ferron's deposition.

## **II. LAW AND ARGUMENT**

Plaintiff does not dispute the legal authority cited within Defendant's Motion regarding the parameters of the spousal privilege. However, Plaintiff objects to VC's propose discovery of the following information: (1) Mr. Ferron's communications or acts disclosed to third parties; and (2) Mr. Ferron's business communications, including any communications made with Mrs. Ferron in her capacity as the office manager and paralegal of Ferron Associates. This information is protected by the attorney-client privilege.

The Ohio Supreme Court has expounded on the attorney-client privilege, and explained as follows:

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States* (1998), 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.\*\*\* By protecting client communications designed to obtain legal advice or assistance, the client will be more candid and will disclose all relevant information to his attorney, even potentially damaging and embarrassing facts." (Footnote omitted.) 1 Rice, Attorney-Client Privilege in the United States (2d Ed.1999) 14-15, Section 2.3; *Taylor v. Sheldon* (1961), 172 Ohio St. 118, 121, 15 O.O.2d 206, 173 N.E.2d 892 (the purpose of this rule is to permit complete freedom of disclosure by a client to his

attorney without fear that any facts so disclosed will be used against him").\*\*\*

“Under the attorney-client privilege, ‘(1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.’ *Reed v. Baxter* (C.A.6, 1998), 134 F.3d 351, 355-356; *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App. 3d 28, 2003 Ohio 3358, 790 N.E.2d 817, P12. Except under circumstances not relevant here, only the client can waive the privilege. See *Allen Cty. Bar Assn. v. Williams*, 95 Ohio St.3d 160, 2002 Ohio 2006, 766 N.E.2d 973, P9-14.”

*State ex rel. Leslie v. Ohio Housing Finance Agency et al.*, 105 Ohio St. 3d 261, 264- 265 (2005).

The attorney-client privilege includes communications to persons acting as the attorney’s agents. *Ohio v. Post*, 32 Ohio St. 3d 380, 385 (1987)(“The [attorney-client] privilege includes communications through persons acting as the attorney's agents.”); see also *Foley v. Poschke*, 66 Ohio App. 227, 228 (8<sup>th</sup> Dist. Ct. App. 1940)(“There is, however, an important exception to this rule of law. When the third person present at a conference between attorney and client is an agent of either, then there arises no presumption that such communication and advice were not made and given in confidence and they do not cease to be privileged because made in the presence of a third party.”); *Kler v. Mazzeo*, 1991 Ohio App. LEXIS 1204, \*11 unreported (8<sup>th</sup> Dist. Ct. App. march 21, 1991)(holding that the presence of attorney’s secretary did not waive attorney-client privilege); *Daniels v. Hadley Memorial Hospital*, 68 F.R.D. 583, 585 (DC Dist. Columbia 1975) (“It is well-settled that a statement by a party to an agent or representative of the party's attorney is protected by the attorney-client privilege. See, e.g., *United States v. Kovel*, 296 F.2d 918, 920-22 (2d Cir. 1961).”)

The attorney-client privilege clearly applies to the information sought by VC in

paragraphs (2) and (3) of VC's Proposed Order to the extent that the inquiry relates to Mr. Ferron's confidential communications with his attorneys of record and their paralegal. Mrs. Ferron cannot be compelled to testify about Mr. Ferron's confidential communications with his attorneys, Lisa A. Wafer and Jessica G. Fallon, made in Mrs. Ferron's presence at work. Because Mrs. Ferron is an agent of Plaintiff's law firm, this testimony clearly is protected by the attorney-client privilege. See *Ohio v. Post, supra*; *Foley v. Poschke, supra*; *Kler v. Mazzeo, supra*; *Daniels v. Hadley Memorial Hospital, supra*.

### III. CONCLUSION

For the reasons discussed herein, Plaintiff respectfully submits that VC's Proposed Order be modified to exclude paragraphs (2) and (3) because this information is protected by the attorney-client privilege.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on October 8, 2007, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel or record having appeared in this matter.

/s/ Lisa A. Wafer  
Lisa A. Wafer, Trial Attorney  
Oh. Sup. Ct. Reg. No. 0074034