

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

JOHN W. FERRON,

Plaintiff,

-vs-

**VC E-COMMERCE SOLUTIONS, INC.,
ET AL.**

Defendants.

Case No. 2:06-CV-322

**Judge Frost
Magistrate Judge Abel**

**MEMORANDUM OF DEFENDANT VC E-COMMERCE SOLUTIONS, INC.
CONCERNING APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO
DOCUMENTS AND TESTIMONY SOUGHT FROM LEAH FERRON**

INTRODUCTION

Defendant VC E-Commerce Solutions, Inc. (“VCES”) issued a subpoena to Leah Ferron on June 28, 2007, seeking deposition testimony and the production of documents. Ms. Ferron is the office manager and a paralegal for Ferron & Associates, counsel for Plaintiff John Ferron and the firm of which Mr. Ferron is the owner and principal. In addition, Ms. Ferron is married to Mr. Ferron.

After a discovery conference on August 29th, 2007, this Court ordered Ms. Ferron to produce several categories of documents responsive to the subpoena and to produce a privilege log identifying any documents that “purportedly fall under a privilege.” (Docket No. 106) The Court also ordered both parties to submit briefs addressing the scope of the spousal privilege. (*Id.* ¶ 21) After briefing, the Court determined that Plaintiff “disavowed Leah Ferron’s reliance

on the spousal privilege,” choosing instead to “assert the attorney-client privilege.” (Docket No. 112 at 1) Therefore, the Court ordered VCES to “file a responsive memorandum on the attorney-client privilege issue.” (*Id.* at 2)

Because this case is before the Court under diversity jurisdiction, Ohio law concerning the attorney-client privilege applies. *Travelers Cas. & Sur. Co. v. Excess Ins. Co.*, 197 F.R.D. 601, 605 (S.D. Ohio 2000) (“In this diversity action, the state law of privilege governs defendant’s claim of attorney-client privilege.”). In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in circumstances outside the scope of the statute, by common law. *State ex rel. Leslie v. Ohio Housing Fin. Agency*, 105 Ohio St. 3d 261, 264 (2005). Mr. Ferron, as the “party seeking protection under the [attorney-client] privilege[,] carries the burden of establishing the existence of that privilege.” *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App. 3d 28, 33 (Ohio Ct. App. 2003).

ARGUMENT

In his brief filed October 8, 2007, Mr. Ferron implies that *any* communication between himself and his wife, while made at work, is protected by the attorney-client privilege because his wife “is an agent of Plaintiff’s law firm.” (Docket No. 111 at 5) This is a false presumption. *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St. 3d 638, 660-661 (Ohio 1994) (“[T]he mere relation of attorney and client does not raise a presumption of confidentiality of all communications made between them.”); *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App. 3d 28, 36 (Ohio Ct. App. 2003) (“The attorney-client privilege is not an absolute privilege . . .”). On the contrary, as quoted in Mr. Ferron’s brief, the Ohio Supreme Court has limited the protection of the attorney-client privilege to “*communications*” relating to “*legal*

advice . . . sought from a professional legal adviser in his capacity as such . . . made in confidence.” (Docket No. 111 at 4 (quoting *Leslie*, 105 Ohio St. 3d at 265) (emphasis added) (internal numbering omitted)) Accordingly, the only information protected by the attorney-client privilege is that which: 1) is a communication, 2) constitutes legal advice, 3) is sought from an individual in his or her capacity as a legal adviser, and 4) is intended to be confidential.

Mr. Ferron mistakenly claims that two classes of information requested by VCES are protected from discovery by the attorney-client privilege. (*See* Docket No. 111 at 3-5) First, Mr. Ferron’s business communications, including any communications made with Ms. Ferron in her capacity as the office manager and paralegal of Ferron Associates, do not constitute legal advice and are therefore not protected by the privilege. Second, Mr. Ferron’s communications or acts disclosed to third parties are not and cannot be protected by the attorney-client privilege to the extent they do not meet the previously-listed requirements, as is demonstrated below.

A. Only Communications, Not Facts, Are Protected by the Attorney-Client Privilege.

It is well settled that “[t]he attorney-client privilege does not prevent disclosure of the underlying fact, it only protects against compelled disclosure of the communications.” *Ingram v. Adena Health Sys.*, 149 Ohio App. 3d 447, 451 (Ohio Ct. App. 2002); *see also State v. Hoop*, 134 Ohio App. 3d 627, 640 (Ohio Ct. App. 1999) (“[T]he underlying facts of a case[] are not privileged.”); *Upjohn Co. v. United States*, 449 U.S. 383, 395 (U.S. 1981) (“The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the

underlying facts by those who communicated with the attorney.”).¹ Although the attorney-client privilege prevents disclosure of the *communications* regarding *legal advice* that Mr. Ferron had with his attorneys, it does not protect from disclosure any *underlying facts* of those communications. Information regarding settings on the firm’s spam filter and the number and addresses of email accounts owned by Mr. Ferron are examples of facts that are not protected by the attorney-client privilege and that the court should order Mr. Ferron to disclose.

B. Business Communications Are Not Legal Advice And Are Therefore Not Protected By The Attorney-Client Privilege.

Business communications are not protected by the attorney-client privilege because they are not necessary to obtaining legal advice. *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App. 3d 28, 36 (Ohio Ct. App. 2003) (“The attorney-client privilege is not an absolute privilege, and it applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice.”); *see also Evenflo Co. v. Hantec Agents Ltd.*, 2006 U.S. Dist. LEXIS 74684, at *10 (S.D. Ohio 2006) (“[T]he privilege only applies if the lawyer is providing legal advice or services and not where the attorney acts as a business or economic advisor and provides nonlegal advice.”); *Foseco International, Ltd. v. Fireline, Inc.*, 546 F. Supp. 22, 24 (N.D. Ohio 1982) (“Communications made in the routine course of business, however, such as transmittal letters or acknowledgment of receipt letters, which disclose no privileged matters and which are devoid of legal advice or requests for such advice are not protected.”).

¹ Mr. Ferron did not raise an objection based on the work product doctrine in his October 8, 2007 brief (Docket No. 111), so that objection is waived, and VCES will not consider it in this brief.

The Ohio Supreme Court has recognized that although the attorney-client privilege can apply “even if the attorney’s position includes performance of nonlegal . . . duties,” that privilege is limited to situations “when legal advice . . . is sought from the legal advisor in that capacity and the client’s confidential communication relates to that purpose.” *Leslie*, 105 Ohio St. 3d at 267. The court specifically noted that simply “sending copies of memos to attorney-employees so as to hide them from the public misunderstands the limitations built into the privilege itself.” *Id.*

In light of this well-settled principle, the court should order Ms. Ferron to disclose any communications with Mr. Ferron, or anyone at the law firm, that relate to business decisions (for example, discussions relating to the firm’s spam policies).

C. Only Communications Sought From An Individual In His Or Her Capacity As A Legal Advisor Are Protected By The Attorney-Client Privilege.

Only communications made between a client and an attorney *acting in his or her capacity as a legal adviser* are protected. *Leslie*, 105 Ohio St. 3d at 265. Therefore, only those communications between Mr. Ferron and his attorneys (or their agents) that occurred while his legal advisers were acting in their capacity to provide legal (not business) services are protected from discovery. *In re Walsh*, 623 F.2d 489, 494 (7th Cir. 1980) (“Business or other advice is not privileged, and should be distinguished from professional legal services. Such general inquiry will aid in identifying which areas may be pursued and which are protected.”). Any discussion of nonlegal matters or advice between Mr. Ferron and his attorneys (or their agents) is not protected by the attorney-client privilege because such communication indicates a business, familial, or other relationship, not an attorney-client relationship for the provision of legal advice. *See In re Grand Jury Proceedings (Doe)*, 575 F. Supp. 197, 203 (N.D. Ohio 1983)

(“Ministerial or clerical services are not within the privilege, nor is business or other advice.”)
(internal citation omitted).

Business documents also fall outside the scope of attorney-client protection as they are created as a result of business activities and not in conjunction with the provision of legal advice. *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App. 3d 28, 35 (Ohio Ct. App. 2003) (“[A] document of the client existing before it was communicated to its attorney is not within the present privilege so as to exempt it from production.”) (internal quotation marks omitted).

Documents reflecting the settings on the firm’s spam filters, bills for spam filtering services, and invoices for Mr. Ferron’s work and personal email accounts are all examples of nonlegal documents that are not protected by the attorney-client privilege and that the Court should order Mr. and Ms. Ferron to produce.

D. Only Communications Made In Confidence Are Protected.

Finally, only those conversations that a client intends his legal advisers to keep confidential are protected by the attorney-client privilege. *State v. Post*, 32 Ohio St. 3d 380, 385 (Ohio 1987) (“The reason for prohibiting disclosure . . . ceases when the client does not appear to have been desirous of secrecy. The moment confidence ceases . . . privilege ceases.”) (internal quotation marks omitted). Any documents and conversations with his attorneys (or their agents) that Mr. Ferron has also shared (or permitted to be shared) with third parties cease to be protected by the privilege. Examples include invoices received from spam filtering services and spam policies discussed with technicians at the firm. The Court should compel the production of these and similar conversations and documents, as the attorney-client privilege does not apply to prevent their disclosure.

CONCLUSION

For all of the foregoing reasons, VCES respectfully requests that the Court issue the attached Proposed Order affirming that Ms. Ferron should only be permitted to assert the attorney-client privilege with respect to *communications* with *legal advisers* concerning *legal advice* intended to remain *confidential*. Neither Mr. Ferron nor Ms. Ferron should not be permitted to assert the privilege to shield testimony about routine communications, communications or acts made or done in the presence of third parties, business communications unrelated to the provision of legal advice, general observations regarding Mr. Ferron, or the facts underlying any communication, privileged or not.

Respectfully submitted,

s/Ashlie Beringer

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**Judge Frost
Magistrate Judge Abel**

**[PROPOSED] ORDER GRANTING VC E-COMMERCE SOLUTIONS' MOTION
CONCERNING APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE DURING
THE DEPOSITION OF LEAH FERRON**

IT IS ORDERED THAT, during the deposition of Ms. Ferron, Mr. Ferron may assert the attorney-client privilege solely with respect to testimony regarding confidential communications with legal advisers (or their agents) concerning legal advice. Mr. 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 unrelated to the provision of legal advice made with Ms. Ferron in her capacity as office manager or paralegal for Ferron & Associates; (4) observations or impressions of Mr. Ferron or his activities; and (5) any facts underlying any communication, privileged or not.

IT IS SO ORDERED.

Dated: _____

Hon. Gregory L. Frost
United States District Judge

CERTIFICATE OF SERVICE

I hereby certified that on October 19th, I electronically filed the foregoing **MEMORANDUM OF DEFENDANT VC E-COMMERCE SOLUTIONS, INC. CONCERNING APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO DOCUMENTS AND TESTIMONY SOUGHT FROM LEAH FERRON** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following mailing addresses:

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