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Marcus v. Harris: Oklahoma Limitations on the Exercise of the Attorney-Client Privilege

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MARCUS v. HARRIS: Oklahoma Limitations on the Exercise of the Attorney - Client Privilege.

In *Marcus v. Harris*,[1] the Oklahoma supreme court has increased the limitations on the application of the attorney-client privilege as embodied in the Oklahoma statute granting the privilege.[2]

In *Marcus*, the petitioner sought a writ of prohibition against the respondent trial judge to prevent the taking of discovery depositions from two lawyers in three cases consolidated for trial in the Oklahoma district court. In these cases, plaintiff, an accounting firm, was suing the defendant for the value of services rendered by the plaintiff as a public accountant. The defendant, in his cross petition, claimed that, due to the plaintiff's negligence, he was forced to employ two lawyers to represent him before the Internal Revenue Service in regard to the negligently prepared returns. The petitioners in *Marcus* sought to have this information declared privileged under the statute.[3]

The Supreme Court of Oklahoma recognized the applicability of the attorney-client privilege to the case at hand. It held, however, that not all communications between attorneys and clients were so privileged. The court empowered the district judge to decide, at the time of entering the deposition, which communications are privileged and which communications are not.

In order to understand the impact of this decision on the privilege, it is necessary to examine the privilege prior to this case.

The attorney-client privilege is an embodiment of the

[1] Marcus v. Harris, 496 P.2d 1177 (Okla. 1972).

[2] OKLA. STAT. tit. 12, §385(4) (1971) provides in part:
The following persons shall be incompetent to testify: . . .
An attorney concerning any communications made to him by his client in that relation, or his advice thereon, without the client's consent.

[3] OKLA. STAT. tit. 12, §385(4) (1971).

common law.[4] The privilege originated in Roman law[5] and became a part of the common law during the reign of Elizabeth I.[6] The existence of this privilege has always been based on the idea that:

> In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by legal advisors must be removed; hence the law must prohibit such disclosures except on the client's consent.[7]

The Oklahoma supreme court has recognized the historical basis for the rule and has interpreted the application of the privilege so as to give this historical basis its full effect.[8] This interpretation has resulted in the placing of certain limitations upon the use of the privilege.

In order for the relationship between an attorney and client to be sufficient to fall within the rule, the court has limited its application to situations where the relationship between the attorney and client is one of trust and confidence. The communication from the client to the attorney must be made in confidence of such a relationship, and the client must intend his communication to be treated as confidential.[9] Thus, the privilege does not exist so as to bar the attorney from testifying to facts within his personal knowledge, if the facts were not told to him in reliance on the confidential relationship.[10] The court has placed a further limitation on the privi-

[4] Black v. Funk, 93 Kan. 60, 143 P. 426 (1914); Brown v. State, 9 Okla. Crim. 382, 132, P. 359 (1913); Evans v. State, 5 Okla. Crim. 643, 115 P. 809 (1911).
[5] T. McCORMICK, LAW OF EVIDENCE §181 (1954).
[6] 8 J. WIGMORE, EVIDENCE §2290, at 547 (McNaughton Rev. 1961) [hereinafter cited as WIGMORE].
[7] WIGMORE §2291, at 550.
[8] Brown v. State, 9 Okla. Crim. 382, 132 P. 359 (1913).
[9] Parnacher v. Mount, 207 Okla. 275, 248 P.2d 1021 (1952); Tankersley Inv. Co. v. Tankersley Inv. Co., 202 Okla. 51, 210 P.2d 167 (1949) (dissent); Wright v. Quinn, 201 Okla. 565, 207 P.2d 912 (1949); Ratzlaff v. State, 122 Okla. 263, 249 P. 934 (1926).
[10] Buxbaum v. Priddy, 312 P.2d 961 (Okla. 1957).

lege by eliminating from the privilege any communications made in the presence of third persons, unless the circumstances are such that the communication retains its confidential character.[11] Statements which are made in the presence of third persons, without justifying circumstances, have been deemed unprivileged, and any party to such communications may testify as to the conversation.[12] These Oklahoma restrictions on the application of privilege are in the most part similar to the restrictions which the federal courts apply to the privilege.[13]

The court in *Marcus* has now expanded the limitations on the application of the privilege. The court held that, while the relationship between attorney and client may be such as to fit within the above guidelines, all such conversations are not privileged. The court held, when information is communicated to an attorney for the purpose of ultimately disclosing the information to third persons, the information loses its privileged character.

The court in reaching this decision further expanded the limitations handed down in other cases. In *Parnacher v. Mount,*

[11] Parnacher v. Mount, 207 Okla. 275, 248 P.2d 1021 (1952); Jayne v. Bateman, 191 Okla. 272, 129 P.2d 188 (1942); Howsley v. Clark, 167 Okla. 371, 29 P.2d 947 (1934).

[12] Joy v. Litchfield, 189 Okla. 122, 113 P.2d 974 (1941).

[13] United States v. United States Shoe Machine Corp., 89 F. Supp. 357, 358-9 (D. Mass. 1950) which provides:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in this connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not for the purpose of committing a crime or tort; (4) the privilege has been (a) claimed and (b) not waived by the client.

this court held that "To enjoy the protection of the statute they must be made in confidence of the relation and under such circumstances as to imply that they *should ever remain secret.*" (*Emphasis added*).[14] Thus in this earlier decision, the court emphasized the need for secrecy before any communication would be entitled to be privileged, but the court did not decide whether all subsequent disclosures would violate this requirement.

In *In re Wilkins,* the court held that in certain circumstances the privilege will be waived by knowledge of possible ultimate disclosure.[15] In *Wilkins,* the court held that one who makes a will does so with knowledge that upon his death it will be published, and that testimony may be required to establish that it expresses his wishes. This decision also failed to eliminate the privilege in all cases of ultimate disclosure to third persons. The court in *Wilkins* was only holding that, when disclosure will result in the communication becoming public, the privilege will be denied.

The court's decision in *Avery v. Nelson*[16] is also in conflict with the *Marcus* decision. In *Avery,* the court held that the physician-patient privilege is not waived by the patient answering questions on a discovery deposition, but is only waived when the patient voluntarily offers himself as a witness. Here again the court was saying that communications which are sure of ultimate disclosure to the public are not privileged, but communications which are intended to be disclosed in limited circumstances, such as a discovery deposition, still retain the privilege.

The court, in reaching its decision in *Marcus,* expanding the limitations on the exercise of privilege in the attorney-client relationship, was following the decision of the United States Court of Appeals for the Second Circuit in *Colton v. United States.*[17] In *Colton,* that court held that "Not all communications between an attorney and his client was privileged.

[14] Parnacher v. Mount, 207 Okla. 263, 248 P.2d 1021 (1952).
[15] *In re* Wilkins Estate, 199 Okla. 249, 185 P.2d 213 (1947).
[16] Avery v. Nelson, 455 P.2d 75, 77 (Okla. 1969).
[17] Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962).

Particularly in the case of an attorney preparing a tax return . . . a good deal of information transmitted to the attorney by a client is not intended to be confidential but rather is given by the client for the transmission to others by the attorney, for example, an inclusion in the tax return. Such information is of course not privileged."

CONCLUSION

In reaching its decision in *Marcus,* the court placed new limits on the extent of the attorney-client privilege in Oklahoma. The court attempted to limit its decision to the specific facts of the case. This limitation, however, does not change the effect of the decision.

As a result of *Marcus,* any communication which is made to an attorney for ultimate disclosure to third persons is outside the privilege, regardless of whether this disclosure will lessen the secrecy of the communication or make the communication public knowledge. The court in reaching this decision rejected the contention that 26 U.S.C.A. §7213,[18] which makes it illegal for federal employees to make public information disclosed on income tax returns, was applicable to the case at hand. The court, by rejecting this contention is, in effect, modifying its holdings in *Parnacher, Wilkins,* and *Avery,* that the privilege will only be lost when disclosure to third persons will result in making the communication public.

The *Marcus* decision can only serve to further restrict the application of the attorney-client privilege and lessen client confidence in the privilege. As a result of this decision, both clients and attorneys must be aware that ultimate disclosure will void the privilege, and that the attorney may be required to testify as to the portions of the communications intended to be disclosed. James L. Sanders

[18] INT. REV. CODE of 1954 § 7213, which provides in part:
> It shall be unlawful for any officer or employee of the United States to divulge or to make known, in any manner whatever, not provided by law, to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return.