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Legal News

U.S. Supreme Court scrutinizing lawyers

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Washington — Call it the month of the lawyer at the U.S. Supreme Court.

During October oral arguments, the justices of the High Court heard four cases that dealt as much with how lawyers do their jobs as with substantive issues of law.

The Court tackled cases dealing with the constitutional implications of bad legal advice, the value of the attorney-client privilege, rewarding superior legal work in civil rights cases, and the effect of a defense attorney who bad mouths his own client.

And although Court watchers don't believe the justices had a sudden deep interest in the day-to-day workings of lawyers, it does reflect the Court's increased interest in procedural issues. Lawyers are a part of that process, so they are getting a good share of the justices' attention.

"I don't think all of a sudden the justices said, 'We need to start regulating the legal profession,'" said Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. "But there has been in increase in the number of more technical cases that focus on procedural aspects of the law [and some involve] the day-to-day legal practice of attorneys."

Point of privilege

In one case, Mohawk Industries Inc. v. Carpenter, while examining the application of the attorney-client privilege, the justices asked questions striking at the heart of attorneys' role in society.

Justice Antonin Scalia asked why the attorney-client privilege should be stronger than other evidentiary privileges.

"[E]xcept for the fact that you and I are lawyers, do you really think that confidentiality right is any more important to the proper functioning of society than, let's say, the protection of trade secrets?" Scalia asked.

Justice Sonia Sotomayor focused on the purpose of the attorney-client privilege.

"Isn't the [purpose] to encourage the frank and open communication between client and attorney?" Sotomayor asked. "[T]he fact is that an erroneous decision on attorney-client disclosure is not going to stop people from talking to lawyers if they really need to." Chief Justice John G. Roberts, Jr., citing an amicus brief submitted by the American Bar Association, worried about the effect of a denying the privilege and its effect on lawyers who "deal with this question on a day-to-day basis and have to worry about going to jail if they want to protect their clients."

In an interview, ABA President Carolyn B. Lamm said that the attorney-client privilege is critical to the judicial system and an important issue for the Court to take up.

"Denying the privilege would undermine lawyers' ability in terms of giving advice, solving problems and resolving disputes if clients couldn't be assured of the confidentiality of that relationship," Lamm said.

The good, the bad and the 'horrendous'

The Court also took a hard look at what should happen when a lawyer is really, really good and when a lawyer is really, really bad.

The "good attorney" case, Perdue v. Kenny A., asked whether a judge improperly boosted an attorney fee award by 74 percent due to the "superb quality" of the results the lawyers obtained in the case. Roberts expressed some discomfort with such a fee enhancement.

"I don't understand the concept of extraordinary success or results obtained," Roberts said. "The results that are obtained are presumably the results that are dictated … or required under the law. And it's not like, well, you had a really good attorney, so I'm going to say the law means this, which gives you a lot more, but if you had a bad attorney I would say the law [means] this and so he doesn't get a multiplier."

In Padilla v. Kentucky., the Court turned to the consequences of bad lawyering.

The case involved a lawyer who advised a client to take a plea deal on drug charges, telling the permanent resident not to worry about consequences to his immigration status. When the guilty plea triggered a mandatory deportation order under federal law, the defendant claimed his attorney robbed him of his Sixth Amendment right to effective assistance of counsel.

Justice Samuel Alito wondered about the consequences of holding attorneys' conduct to such high constitutional standards.

"What troubles me about it is the situation in which the defendant claims … that misadvice was given by a busy public defender who has handled 500 cases and is unable to remember what, if anything, was said about the immigration consequences of the case," Alito said.

But Justice Stephen Breyer asked about the moral obligation of lawyers to give crucial information to their clients, using a political asylum hypothetical.

"What if [the defendant] tells you this story where it is quite apparent to you that if he pleads guilty, back he goes, where he might be killed and so might his family?" Breyer asked. "[Of] course, you would tell the client [the consequences.] Then has a lawyer who has failed to do so not met the prevailing professional norm? … I don't see how you avoid answering that question 'yes.'"

In another case, Smith v. Spisak, an appeal by a capital murder defendant whose lawyer emphasized the "clearly horrendous" nature of his crimes in closing statements at the sentencing stage of trial, the justices again parsed the lawyer's performance.

Although the defendant argued that his lawyer's job wasn't to bad mouth him, but to explain why mental health evidence mitigated the crimes, Scalia thought the attorney was doing just that.

"I think it was swallowing the worst evidence," Scalia said, pointing out that the jury "was going to think this is a hateful person who had done hateful things."

"I thought it was a brilliant closing argument," Scalia said.

More arguments ahead

The Court is not done examining how lawyers do their jobs. On Nov. 4, the justices will hear oral arguments in a case dealing with the alleged bad deeds of prosecutors. Pottawattamie County v. McGhee asks whether a prosecutor may be held civilly liable for wrongful conviction and incarceration for allegedly procuring false testimony during a criminal investigation, and then introducing that same testimony against a criminal defendant at trial.

The same day, in Wood v. Allen, the Court will consider whether a defense attorney's failure to present evidence of the defendant's impaired mental functioning in a capital case constituted ineffective assistance of counsel.

Decisions in all of these cases are expected this term.