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Bad Facts Make Bad Law!

Justice™ Staff

The very first ruling of the current term of the Supreme Court of the United States, announced by the newest Justice, Sonia Sotomayor, on 8 December 2009, is a bad one, in the opinion of Justice™, because it denies parties' right to immediately appeal trial judge orders that require disclosure of protected attorney-client communication.

Mohawk Industries, Inc. v. Carpenter, (U.S. 12/8/2009). Read the full opinion at:

http://www.supremecourtus.gov/opinions/09pdf/08-678.pdf

Carpenter was employed by Mohawk, the carpet company. Carpenter was fired after allegedly reporting Mohawk's use of illegal immigrants. At the time Mohawk was being sued by Williams for similar acts. Mohawk then directed its counsel in the Williams case to interview Carpenter!

Carpenter subsequently sought discovery of his own communications with Mohawk's counsel, a reasonable request as Justice™ sees it ... but bad for appellate review and the future of attorney-client privilege.

The trial judge granted the request, and Mohawk predictably appealed.

The case worked its way through lower appellate levels to the Supreme Court that agreed 9:0 with Sotomayor's opinion that a party has no right to interlocutory appeal (i.e., immediate appeal, rather than waiting for appeal after final judgment) of orders eviscerating the attorney-client privilege!

This is a giant hole in our privacy dyke!

In this unusual case, the usually privileged communications were between the party seeking disclosure and a lawyer with whom he, himself, was communicating (i.e., his employer's lawyer with whom he was ordered to meet). This rare fact may have weakened Mohawk's right to the traditional sanctity of attorney-client privilege but, as we were taught back in law school, "Bad facts make bad law."

That is exactly what has happened, and our system of government has no higher court to reverse this bad decision.

The attorney-client privilege was abused by the trial court, and the Supreme Court affirmed the trial judge's error.

The consequence of such disclosure is so irreparable that a petition for issuance of a writ of *certiorari* should be available to stop disclosure at once, resolving the issue by interlocutory appeal, rather than permitting the case to continue to its foreseeable conclusion and only then to allow the abused party to appeal.

When a trial judge enters an order that "departs from the essential requirements of law" appellate review is, and should be, available by immediate petition for a writ of *certiorari* instead of allowing the error to stand and forcing the aggrieved party to seek appellate remedy only after entry of final judgment.

For example, issuance of a writ is proper to reverse a trial judge order overruling objections to a request for the production of documents, since issuance of such an order allows irreparable injury that cannot be cured on appeal at the conclusion of a case. American Investment v. Barnett, 997 So.2d 1154, Fla. 3rd DCA 2008).

Similarly, issuance of the writ is proper where the trial judge overrules objections to interrogatories. Baptist Hospital v. Garcia, 994 So.2d 390 (Fla. 3rd DCA 2008).

The parallel with allowing disclosure of traditionally protected attorney-client communications is clear.

The opinion of Justice™ notwithstanding, the Supreme Court issued its ruling, and it is now "the law of the land".

Beware what you and your lawyer discuss in private hereafter!

Error also arose in a government *amicus* brief arguing the issue involved "state secrets" when, in fact, the issue turns on a far simpler issue of when, prior to the final judgment, appellate relief may be sought to stop disclosure of traditionally protected privileged communications.

Will husband-wife privilege fall next? Or priest-penitent?

The bell has rung, and all presently sitting Supreme Court Justices agree.

As is the case with many such decisions, the result springs from poor lawyering on the part of the litigants themselves where bad arguments lead to bad decisions, even as bad facts make bad law.

But, the 9:0 decision will stand, and the rights of the American people will suffer, as greater abuse of the discovery process will no doubt spring from this decision.

Though the current term of the Supreme Court began the first Monday in October (as it does each year) this first ruling was not announced until the 8th of this month.

Justice™ holds the view that, although in many cases appellate review is premature before final judgment, there are errors of trial judges (such as those denying parties the right to object to disclosure of facts that by all rights should be protected) that demand *immediate* appellate review.

To allow judges to order the disclosure of traditionally protected information that has been privileged for centuries so that such information is entered on the court record and require the aggrieved party to continue the battle without being protected from the consequence of such disclosure, is an injury that cannot be cured on appeal.

Sotomayor's decision and concurrence of the entire Supreme Court Bench constitutes "departure from the essential requirements of law".

It has nothing to do with "state secrets".

Indeed, perhaps there is too much talk of state secrets these days and not enough about individual rights and the obligation of our courts to protect us from demands that eviscerate any chance for a fair trial.

Hold on to your discovery hats, people!

Help Stop Health Care Fraud

Justice™ Staff

Of 1,040 fraud cases under investigation, some 600 involve health care fraud, and 2/3 of money recovered by Justice Department investigations involve health care, with $1.6 billion recovered this year, per Tony West, Assistant Attorney General.

The question Justice™ wants to ask is this: "How much more are we tax payers being bilked by fraud that goes undiscovered?"

Medicare recipients and those covered by medical insurance receive statements each month showing what medical service providers charge and how much is paid by the government or insurance companies.

If you read those statements you will see where potential fraud exists and can report same to the proper authorities.

For example, if you or a loved one see a charge on the statement that seems a bit too excessive, perhaps it is excessive. Or, a charge may appear more than once for the same service or device, showing that the provider is fraudulently double-dipping.

The cost of such fraud is demonstrated by the $1.6 billion recovered that reflects the very real possibility that the undiscovered costs are many times higher – costs we the American People can reduce simply by the simple matter of reporting providers who seem to be receiving more than they are giving to us.

According to Lanny Breuer, Asst. Attorney General for the Justice Department Criminal Division, "tens of millions of dollars" were stolen from a government program aimed at helping deaf people in nine states. The program is funded by, and the cost of thefts affect "every single American," Bruer said. As a result of an FBI investigation, 26 were indicted.

But, of course, this is just the tip of a giant iceberg of crime that costs all us taxpayers, crime that we *can* reduce by simply getting involved when we can.

Medical insurance premiums and the tax bite to fund government medical coverage is a major portion of the take-home income of most American families.

Each of can do something to reduce those costs by simply reporting apparent fraud.

To paraphrase Smokey the Bear®, "Only you can prevent health care fraud."

The more money we allow fraudulent medical providers to steal from insurance companies and government funds the less there is to pay for the medical care we need for ourselves and our loved ones.

Fraud is both a crime and cause of action, i.e., a right to sue. Fraud arises whenever one represents a thing to be true that is known to be untrue and, as a consequence, causes damages to another.

In the case of medical fraud, all of us are injured parties because we all must pay the costs associated with it.

So, when you see a suspicious charge on a medical bill being paid by medical insurance or Medicare, report it to authorities.

America is a contact sport.

Get involved.

How to Hire a Lawyer

(Continued from Previous Issue)

Dr. Frederick D. Graves, JD

Character

As I said at the close of the previous issue, I cannot stress too much the importance of looking for a lawyer with soul, a lawyer who cares, listens, communicates effectively, and exudes a sense of responsibility to do "what's right", demonstrating to all the world in words and actions that there isn't enough money in the world to turn him or her from the path of honesty and truth.

More than any aspect of what we lawyers do: the legal battle is a fight for Truth.

I've said it before, and I'll say it again: There are two kinds of lawyers – those who seek to put the truth on public record for all to see, and those who seek to hide the truth.

Whatever you do, hire a lawyer who is honest!

We fight with words, instead of swords and guns, yet we lawyers engage in battles that change the world … *your* world … either for the better or for the worse. The changes we bring about depend on what sort of people we are, what we know about life, how we feel about the needs of others, and whether we're committed to do "what's right".

We may be hated and distrusted, yet it is *our* words that change and mold the law we all obey … and that won't change, no matter how hard some people fight to oust us from your legislatures or remove us from the judicial benches of your courts. Our arguments become laws that control and direct human behavior.

Legislation and litigation together form the bedrock of law.

Lawyers shape and determine the laws that rule us all from cradle to grave.

This responsibility should make all lawyers tremble. It should compel us to pray for greater wisdom. It should humble us to work harder for the truth in which real justice and genuine liberty are forged. It should challenge us to be better citizens, honoring our call to champion the various causes of our clients for the sake of "what's right" – rather than what's most profitable for ourselves.

But!

The reason there are so many lawyer jokes is that there are far too many dishonest lawyers. If this were not true, the jokes would disappear.

If lawyers truly want to change their public image, they need to clean up their own ranks … disbarring the liars, cheats, and thieves … the sharks and charlatans that bring a bad name to my profession.

You absolutely, positively must hire an honest lawyer!

You absolutely, positively must *not* hire a dishonest lawyer!

A dishonest lawyer will cheat you out of your money. He will lie to you. He will lie to the court. He will lie behind your back to the other side. He will not be trusted by judge or jury. And, when you've lost your case at last and face a lifetime of wondering, "What happened? Why did I lose?" he will turn to you with a shrug of disinterested shoulders and tell you there was no way he could have known … when all along he knew he was leading you to certain destruction and loss.

So, how do you determine if a lawyer is honest or dishonest?

Simple, really.

When chatting with a lawyer you might consider hiring, ask what things the lawyer is willing to do to win your case. If the answer does not sound honest, it probably isn't – and you should immediately excuse yourself politely and leave that office in search of another lawyer to represent you.

I've sat in on meetings with other lawyers and their clients and heard the lawyers explaining how they intended to "bury the other side in paperwork" or intimidate the opponent with tax-related discovery. Although such tactics are often used and occasionally successful, you are taking a giant risk hiring a lawyer who uses such tactics, because in the long run you'll discover that honesty is, after all, the best policy, just like the ancient maxim says.

Check references!

Ask some judges *before* you go to court. Ask at least two or three judges whose reputation is above reproach. They know who's honest and who's not. It's true they're not supposed to tell you, and some will obstinately refuse, but if you ask in a private setting, explaining that your world is falling apart and you're afraid of hiring the wrong "kind" of lawyer, a good judge will give you a list of names, men and women who've appeared in court in the past, professionals who can be trusted at their word – and, therefore, likely to receive a bit of favorable edge from the court..

Why should you be concerned about getting a "good one" when it comes time to hire a lawyer to represent your case?

Why aren't we *all* good?

Why aren't we *all* competent?

Why aren't we *all* honest, hard-working, and effective?

Human nature and self-interest.

It's that simple.

Lawyers are people, too!

We're as different as snowflakes … or pig noses.

That we are not all equal in our ability to win your case might seem too obvious to state, yet it goes to the heart of the problem that gives rise to the plethora of lawyer jokes heard on every hand these days.

Some lawyers are saints.

Others are snakes.

How can you tell the difference?

I'll tell you more in the next issue.

To be continued ...

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