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High Court Mulls Immunity For Gov't-Hired Private Attys

By **Roxanne Palmer**

Law360, New York (January 17, 2012, 10:02 PM ET) -- U.S. Supreme Court justices grilled attorneys Tuesday in an appeal over whether private lawyers working for governments have the same shield against lawsuits that government employees do under qualified immunity.

The case pits petitioner Steve Filarsky, an attorney hired by the city of Rialto, Calif., to assist with internal investigations of city employees, against Nicholas B. Delia, a Rialto firefighter who claims Filarsky's advice led to a violation of his constitutional rights. Filarsky is fighting to overturn a Ninth Circuit ruling saying he can be sued over his work for the city.

Patricia A. Millett of Akin Gump Strauss Hauer & Feld LLP, representing Filarsky, told the justices that when a private attorney is "getting the government's work done, that attorney is entitled to the same immunity that a government employee performing that same function for that same government would receive."

Meanwhile, Delia's lawyer, Michael A. McGill of Lackie Dammeier & McGill APC, argued that there is no historical precedent for granting qualified immunity to private attorneys.

"Never has there been an immunity for an attorney just because they happen to be an attorney," McGill said.

Delia became the subject of one of Filarsky's investigations when he was suspected of inappropriately using sick leave to work on remodeling his home. He sued Filarsky, the city of Rialto and others in May 2008, claiming his Fourth Amendment protection against unreasonable searches and seizures was violated when he was ordered to retrieve insulating material from his home as part of the investigation.

A California federal judge tossed the case in March 2009, finding that all the individual defendants were immunized and that the city could not be held liable because Delia had failed to show that a municipal policy caused his injury.

But the Ninth Circuit reversed the grant of immunity with respect to Filarsky, saying it was bound to follow another Ninth Circuit panel's 2003 decision in Gonzalez v. Spencer on immunity for outside attorneys, rather than the Sixth Circuit's decision in Cullinan v. Abramson, which granted qualified immunity to a law firm hired by the city of Louisville, Ky.

Assistant to the Solicitor General Nicole A. Saharsky, representing the federal government as an amicus curiae for Filarsky, told the justices that the Ninth Circuit's broad prohibition against qualified immunity for any private person did not square with the Supreme Court's prior decisions in Richardson v. McKnight or Wyatt v. Cole.

The high court's 1997 decision in Richardson v. McKnight denied qualified immunity to private prison guards, while the 1992 ruling in Wyatt v. Cole denied immunity to a man who used state law to seize his business partner's property.

Filarsky's petition for a writ of certiorari had pointed out that the court's opinion in Richardson v. McKnight "expressly noted a historical basis of immunity for private lawyers working at the behest of" a government.

Some justices questioned whether immunity was necessary for attorneys, given that they are already held accountable by their professional obligations. But Millett noted that under that rationale, government lawyers would not be entitled to that protection either.

Protecting private individuals working for the government is in the government's best interest, Saharsky said, in order to "make sure that their decisions aren't chilled, that persons like [the] petitioner are willing to take on representation of this kind."

But McGill argued that competition from other attorneys or investigators, rather than the prospect of being immunized from lawsuits, is a sufficient enough force to prevent private attorneys from being timid in dispensing advice to governments.

Moreover, McGill said, private attorneys should not be entitled to the same benefits as in-house government lawyers because they are guided by different interests, primarily profit — an assertion that drew a sharp reply from Justice Antonin Scalia.

"Everybody takes a position to make money for profit," Justice Scalia said. "How many government employees work for free?"

Chief Justice John Roberts seemed to signal that he was leaning towards Filarsky, saying the current case was a very good example of why lawyers ought to have qualified immunity.

"We want Filarsky to give what he — do what he thinks is the right thing in this situation. We don't want him to be worried about the fact that he might be sued," Justice Roberts said.

Countering McGill's assertion that there was no historic basis for qualified immunity, Justice Elena Kagan pointed out that this type of immunity was developed in 1970 and thus had much less history to draw upon.

After the hearing, McGill told Law360 that he didn't get the impression that the court was favoring one side or the other.

"If the court follows precedent and doesn't usurp Congress' role by creating new law, we should prevail," McGill said.

Millett declined to comment further Tuesday.

In an amicus brief filed in November, the American Bar Association said that lack of protection for private lawyers retained by governments will have negative impacts on the government's ability to settle legal conflicts that require outside counsel.

Filarsky is represented by Patricia A. Millett, James E. Sherry, Barry Chasnoff, Amit Kurlekar and James E. Tysse of Akin Gump Strauss Hauer & Feld LLP and Jon H. Tisdale and Jennifer Calderon of Gilbert Kelly Crowley & Jennett LLP.

Delia is represented by Michael A. McGill, Dieter C. Dammeier, Michael A. Morguess, Christopher L. Gaspard and Carolina V. Cutler of Lackie Dammeier & McGill APC.

The case is Filarsky v. Delia, case number 10-1018, in the U.S. Supreme Court.

--Additional reporting by Maria Chutchian. Editing by Kat Laskowski.