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HARRY JOE & THE DUTY OWED

JUSTICES HOLD FATE OF LAWYER-LEGISLATORS IN THEIR HANDS

Mary Alice Robbins

Texas Supreme Court justices peppered attorneys with questions on April 9 during arguments in a case that could decide whether a lawyer-legislator can be sued for failing to inform clients of any legislation that might affect their interests adversely.

"Why should the lawyer, just because the lawyer happens to be a legislator, be insulated from that kind of liability?" was a question Justice Craig Enoch wanted answered.

But Chief Justice Tom Phillips questioned whether a lawyer-legislator has a duty to be "vigilant" about all the bills filed in the Texas Legislature that might affect a client's interests.

How the court rules in Harry Joe and Jenkens & Gilchrist v. Two Thirty-Nine Joint Venture could affect whether lawyers will be willing to serve as elected officials in the future.

In Joe, the high court will wrestle with a 2001 decision by the 5th Court of Appeals in Dallas that held that a lawyer serving on a city council has a duty to check for and disclose any conflict of interest that might affect his firm's representation of a client's interests and that neither the lawyer nor his firm is immune from suit when that duty is breached.

The principals in the joint venture sued Joe, a member of the Irving City Council, and his firm, Jenkens & Gilchrist, for malpractice and breach of fiduciary duty after Joe voted in September 1994 for a moratorium on apartment construction in Irving, which squelched a land sale the group had in the works. In its 2-1 decision, the 5th Court reversed a summary judgment that the 14th District Court in Dallas granted to Joe and the firm based on Joe's official immunity from such a suit.

According to the 5th Court's opinion, Jenkens & Gilchrist had represented Two Thirty-Nine Joint Venture in its business of acquiring, developing and selling land in a master-planned community. But the city council unanimously approved the moratorium on apartment development before the joint venture could finalize the sale of an 11-acre tract that had been zoned for apartments, the opinion said.

"Joe prejudiced his firm's client's interests by failing to inform the firm of the conflict between the client's interest and his support for the moratorium 'in the public interest.' That prejudice could have been avoided," former 5th Court Justice

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Barbara Rosenberg, sitting by assignment, wrote for the majority.

Justice Martin Richter joined Rosenberg in the opinion, and Justice Kerry FitzGerald dissented.

In his dissenting opinion, FitzGerald voiced concern about the duties to inform and disclose created by the majority "that may affect lawyers serving in the public sector." FitzGerald said in the dissent that Joe acted as a city councilman in advocating and voting for a policy that he thought was in the best interests of the city and his conduct should be protected by legislative immunity.

Michael P. Lynn, an attorney for Jenkens & Gilchrist, argued to the Supreme Court last week that the 5th Court's opinion disserves the public interest. If the decision stands, "the legislative process will be inhibited and could be corrupted," contended Lynn, a partner in Dallas' Lynn, Tillotson & Pinker.

Lynn argued that the Supreme Court will set policy regarding whether legislators are going to be "saddled" with civil liability and have the duty to determine whether any legislative action might have an adverse effect on a client.

"There is no way someone can go through the Legislature and look at the 5,000 or so bills that are submitted, as well as the amendments, and make a determination within the number of days that are required as to what the interests are of every client within the firm," he said.

Amy Warr, the state's assistant solicitor general, argued that legislative immunity is "absolute." The Office of the Attorney General urged the Supreme Court in an amicus brief submitted on the state's behalf to disapprove of the 5th Court's ruling and to hold that "acts by attorney-legislators in their public role are within the scope of legitimate legislative activity, even if those acts may have an adverse impact on client interests."

The practical effect of the 5th Court's ruling, according to the OAG amicus brief, is to require lawyer-legislators, while in their public role, to advance the interests of their law firms' private clients.

But the idea that legislators would be immune from suits brought by their clients appeared to trouble at least one member of the court. "It just seems to me odd that a legislator can go and take somebody's money and say, 'I'm going to do my best for you' and then not, and if he's a legislator, that's OK," Justice Nathan Hecht said to Warr.

"Legislative immunity basically allows for that to occur in some circumstances, but the greater good - to have independent and effective legislators for the public - outweighs that. Legislative immunity is not to protect individual legislators, but to protect the public," Warr said.

Seemingly unconvinced, Hecht asked, "Wouldn't we be better off with an independent legislator who wasn't cheating his clients?"

If the Supreme Court finds that legislative immunity is not appropriate, lawyer-legislators would retain their official immunity - the immunity possessed by all public officials who perform their discretionary duties in good faith - the OAG said in a footnote in the state's brief.

Conflict Questions

David L. Patterson, attorney for Two Thirty-Nine Joint Venture, reminded the

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court that, in the Texas Lawyer's Creed, the first stated obligation of a lawyer is one of allegiance.

"The result sought by petitioners would appear to eliminate that duty for the lawyer-public official," argued Patterson, a shareholder in Dallas' Godwin Gruber.

"So, he's just supposed to vote however his clients tell him?" Hecht questioned.

Patterson said a lawyer-legislator isn't supposed to vote how his clients tell him to vote. The joint venture's complaint isn't about how Joe voted, he said.

"The duty that we're complaining about in this case is the failure to even inform the client in the first instance that something is going to happen that will negatively impact them," Patterson said.

Patterson said his client had an opportunity to avoid the effect of the moratorium if it had been notified about the council's plan to vote on the issue. Under a "grandfather" clause, he said, the joint venture could have platted its property before the moratorium took effect.

But Justice Harriet O'Neill questioned whether grandfathering all his firm's clients so that several apartment complexes could be built would conflict directly with Joe's duty to the public as a legislator.

What Joe failed to recognize, Patterson contended, is that he did have a conflict in the situation. He contended that no system was in place at Jenkens & Gilchrist to screen Joe from such conflicts.

The brief filed for Joe with the Supreme Court said that Joe reached the decision that he was not disqualified from voting on the moratorium based on the fact that neither he nor any other Jenkens lawyer ever had represented the joint venture before the city of Irving.

Roger Hayse, chief operating officer for Jenkens & Gilchrist, says, "We have a strong conflicts review process, and it applies to Harry Joe and every other lawyer in the firm."

Hayse says the review process has been in place for more than 20 years, well before Two Thirty-Nine Joint Venture became a client.

But Prater Monning III, attorney representing Joe, said during arguments that the 5th Court imposed a duty on Joe to get involved in the representation of private clients and a duty on his firm not to screen Joe from the representation of private clients.

Monning, a partner in Dallas' Monning & Wynne, argued that Joe and the firm can't comply with the standard that the court of appeals imposed upon a lawyer-legislator and at the same time comply with Texas Disciplinary Rule of Professional Conduct 1.10, which requires a lawyer serving as a public officer not to participate in, and to be screened from, his firm's representation of a client in any matter before the public body in which the lawyer serves.

Justice Priscilla Owen, whose nomination to the 5th U.S. Circuit Court of Appeals is pending in the U.S. Senate, was absent from the arguments in Joe.

"It's, I suppose, anybody's guess whether she will participate in the deliberations and a decision in this case, but she is not disqualified," Phillips announced before the arguments began.

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Joe, who was present for the arguments, said in an interview outside the Supreme Court building that he doesn't see how a lawyer could ever serve in an elected or appointed position if the 5th Court's decision remains intact.

"If this rule is imposed, and you can get lawyers to serve in such a capacity, they would spend all their time just scanning for conflicts. They could never get to the real issues for which they were elected to address," he says.

Notes Joe, "I think for all practical purposes, lawyers would be eliminated from the legislative process."

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