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Texas Supreme Court Provides Shield for Lawyer-Legislators

John Council
Texas Lawyer
09-13-2004

Harry Joe was vacationing in Providence, R.I., on Sept. 3 when a case that haunted him for seven years finally ended. And that location was a historically appropriate place to receive the news, he says.

The Texas Supreme Court's opinion in *Harry Joe and Jenkens & Gilchrist v. Two Thirty-Nine Joint Venture*, a highly anticipated decision, holds that clients cannot sue lawyer-legislators for voting as legislators against clients' interests. [\[See the opinion.\]](#)

The decision allows thousands of Texas attorneys to continue serving on public boards and in elected office without worrying about millions of possible conflicts posed by representing individual private clients as an attorney.

To Joe, a partner in Dallas' Jenkens & Gilchrist and a history buff, hearing the news in the nation's smallest state was, well, providential.

"Rhode Island was founded by Roger Williams. And his purpose in founding that state was freedom from persecution," Joe says. "To get that decision in a place that was founded on freedom from persecution was just ironic. "

The high court's unanimous decision is important because it spells out that lawyer-legislators now are free from having clients control how they vote — a proposition that would have made it nearly impossible for lawyers to serve in public office, Joe says.

In 1997, Jenkens client Two Thirty-Nine Joint Venture sued Joe, then a member of the Irving City Council, and the firm for malpractice and breach of fiduciary duty after Joe voted for a moratorium on apartment construction in Irving. Two Thirty-Nine claimed that Joe's vote as a council member squelched a land sale the group had in the works. *[See "Harry Joe & the Duty Owed," Texas Lawyer, April 14, 2003, page 1.]*

Joe won a summary judgment from a Dallas trial court, but Dallas' 5th Court of Appeals, by a 2-1 vote, overturned that decision in 2001. The 5th Court ruled that Joe prejudiced the interests of his firm's client by failing to inform the firm of the conflict he had between the client's interest and his support for the moratorium.

Lawyer-legislators were so concerned about the 5th Court's decision that in 2003 the Texas Legislature — which has more than 30 attorney members — passed S.B. 1047, which protects licensed professionals from being sued or punished for votes they make in an appointed or elected office.

The Texas Supreme Court's decision in Harry Joe reverses and renders the 5th Court's decision, ruling that the joint venture take nothing from Joe and Jenkens.

Had the 5th Court's decision not been reversed, it would have been a disastrous outcome for lawyers who serve on public bodies, says Mike Lynn, a partner in Dallas' Lynn, Tillotson & Pinker who represents Jenkens in the case.

"Like it or not, lawyers tend to serve on boards because they have the training and inclination to do so," Lynn says. "It would be a horrible loss if all of the sudden they had to leave. "

But a lawyer-legislator's clients also have reasons to be troubled by the decision, says David L. Patterson, a partner in Dallas' Godwin Gruber who represents Two Thirty-Nine.

"If you're going to hire an attorney-legislator, you better be careful about what issues are coming up before him," Patterson says. "Because that attorney has no obligation to inform you of anything he's learned in the course of his legislative duty. "

Patterson doubts his client will ask the high court to rehear the case.

And there's not much of a reason to ask for a rehearing, says Prater Monning III, a partner in Dallas' Monning & Wynne, who represents Joe.

"It was a very straightforward, simple opinion. There was not a lot of rhetoric," Monning says. "They just decided the case the way they should have. "

Legislative Immunity Wins

From the outset of the opinion, the high court recognized that there is an inherent conflict when lawyer-legislators vote on matters that affect private clients.

But in those situations — ranging from lawyers who serve on city councils to those who are U.S. senators — legislative immunity always trumps the fiduciary duty a lawyer owes a client, the high court ruled.

"Our legal system has long recognized the vital role of the fiduciary duties that attorneys owe their clients," wrote Justice Dale Wainwright, who delivered the opinion of the court. "Our system of government charges legislators with fidelity to the public trust in the discharge of their official duties. We affirm the vitality of both obligations. "

"However, when these obligations conflict, we hold that legislative immunity shields lawyer/legislators from civil liability for activities within their legislative capacities," Wainwright wrote.

The decision reaffirms the importance of having an independent legislature, says state Rep. Steve Wolens, D-Dallas, who is a partner in Dallas' Baron & Budd.

"To do otherwise would have reached an untenable result," Wolens says.

"A lawyer-legislator would be obligated to vote the interests of a paying client," Wolens says. And it likely wouldn't stop there, as other professionals likely would be prevented from voting on subjects that affect clients. "If you say a lawyer can't serve, a doctor can't serve, and the insurance broker or agent cannot serve," Wolens says.

Wolens even brought up the then-pending Harry Joe appeal in early 2003 as a reason why the Texas Legislature should not vote on H.B. 4, the omnibus tort reform bill. Wolens argued that the bill, which included a constitutional change to the open courts provision of the Texas Constitution, would affect many of the legislators' practices.

But Wolens' concerns were rejected, labelled as a means of holding up H.B. 4, which legislators eventually passed and signed into law last year.

Feeling Good

Last week marked the 10-year anniversary of the apartment moratorium vote Joe cast as a city council member that sparked the litigation.

Joe's opponent prominently featured that litigation in a mayoral run for Irving in 1997 — a race Joe lost by a mere 49 votes. Joe's opponent accused him of having a conflict of interest in the heated race, an accusation that had a damaging effect on his election bid, he says.

"After losing that election, then the lawsuit got filed that summer and we went through the summary judgment process," Joe says. "They [Two Thirty-Nine] drug me through the [State Bar of Texas] grievance process. And there was no finding of wrongdoing there. "

After winning the summary judgment ruling at the trial court level, Joe says he watched in shock as the 5th Court issued its reversal, setting off the high court appeal.

"I was just amazed that we had to go this far to get this result which I thought was obvious," Joe says.

But if he was the person who had to go through the litigation to clarify the law, that's OK, Joe says.

Although no longer a city council member, Joe now is a member of the Judicial Nomination Committee that recommends municipal judge appointments to the Dallas City Council.

"I feel good about this because I know that other lawyers and other professionals now know that they don't have to go through what I did," Joe says of the litigation. "They can truly serve the people that elected them and this tactic that 'you've got a conflict' will never raise its ugly head and intimidate a public official. "