

ORAL ARGUMENT – 04/09/03
02-0218
JENKINS V. TWO THIRTY NINE

LYNN: Two years ago this court in Terry decided that Texas and federal courts have recognized that individuals acting in their legislative capacity are immuned from liability. The court then concluded we do so not to protect the individual legislator, and I might add the lawyer or the law firm, but to serve the public interest.

The Dallas court's decision just serves the public interest. If permitted to stand the public business, the legislative process will be inhibited and could be corrupted as it was when 239 JV attempted to do so when it brought this case.

O'NEILL: Can you cite to me where the legislative immunity or absolute immunity argument was preserved? My understanding is it was not raised in the TC.

LYNN: With respect to Jenkins and Gilchrist, certainly both absolute immunity was asserted. With respect to Mr. Joe in his summary judgment basis he asserted immunity without designating whether it was official immunity or legislative immunity.

O'NEILL: Well isn't it always couched in terms of good faith and not really for the _____ of legislative or absolute immunity only?

LYNN: Mr. Joe's pleadings did both. There was an affidavit that suggested that he was a legislator, he pled immunity, summary judgment was granted. With respect to the issue of immunity there was no basis stated, as I understand it, any basis that would support that summary judgment have to be evaluated by the courts. And I think that's where the Dallas CA made its error.

With respect to Jenkins & Gilchrist it is absolutely clear that both were asserted: both official immunity and legislative immunity were asserted.

HECHT: CAN'T HEAR QUESTION.

LYNN: The _____ here is really legislative immunity. But your question raises really the very same point. After the Sept. meeting when the notice of _____ was invoked, three days notice was given, Mr. Joe had no earthly idea who 239 JV was and there's nothing in the record that suggested he did. What the duty is, and the reason the duty is so unworkable and so broad is it would require Mr. Joe who doesn't have a clue as to whether or not 239 JV exist or what's in _____ to go back and search through...

HECHT: But _____ do that all the time. The _____ a group that was opposing this development and arguing for a moratorium _____ we want

you to represent us, which you couldn't do that. But a lawyer _____ and we want you to represent us in this matter. You just have to do _____.

LYNN: Certainly had that occurred he would have been on notice and would have been able to decline it. But where you're asking a legislator, such as Mr. Joe or any legislator in the State of Texas to go through their forms, look through their 2 or 3 or 4,000 matters that might be open at any given point for an attack and define what their interest might be, and within 3 days then seek their consent as to whether or not to determine whether the vote would be adverse or in their favor, and then seek their consent is unworkable. And that's why I believe this court in Perry made the decision that where the acts are related to legislation there is a grant of immunity.

HECHT: So if Mr. Thau had been the city council person, no difference in the result?

LYNN: The only difference that I could see, there would be no difference if the immunity was granted. If this court finds that legislative immunity means what I believe it says and what this court stated in Perry, you are absolutely correct.

PHILLIPS: So he's got to _____ his client, he knows what their interest is, they want him to go out there and do everything they can do to get this development done, and yet he's going to walk out of the building, go down the street and vote against it.

LYNN: I believe that the appropriate solution to that would be political. I believe that this court is setting policy with respect to whether the legislator is the one to be saddled with civil liability, whether they are going to establish a duty that would require each legislator to search every client to determine whether or not there was an adverse impact.

PHILLIPS: But it seems to me that it's awfully hard to tell a client you know your lawyer is sure looking to represent your best interest. He's going to be casting the deciding vote this afternoon at the city council against you.

LYNN: I can understand full well the frustration of a client. But I think there's a larger public need here and that preserves the legislative process which is becoming corruptive, or the pressure being placed unduly on legislators. Because I submit that if this court were to establish such a duty, the legislative process - if it had lawyers would grind to a halt. There is certainly no way that anyone can possibly go through the legislature and look at the 5,000 or so bills that are committed 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.

Now does that client have an opportunity to move on to another law firm? Can they become upset? Yes. There are lots of lawyers in Texas and I'm sure they could find representation somewhere else.

WAINWRIGHT: In J. Hecht's hypothetical, Mr. Thau knowingly knew about what was

happening on the public side and privately in dealing with 239 JV was going to go ahead and attend the first vote on the moratorium, and vote in favor of it. Would he have had a duty to disclose that to 239 JV, because he was on the list and would have known about both sides of this equation?

LYNN: As I understand it the duty would be absolute except for a few I think very rare exceptions _____ legislative intent, I think was one of them that was outline in Perry. Not unlike diplomatic immunity that might exist with respect to those who are involved in an embassy. In this situation, I guess since the beginning of organized democracy including, I might add wrong, the senate was always exempt from any liability both criminal or civil.

WAINWRIGHT: You suggested that there was something material about him asking to be put on notice of this vote coming up. If Mr. ____ who was going to the council meeting who had been representing 239 JV was on notice that had actual knowledge of all the representations provided by the firm of 239 JV, would he had had a duty to at least disclose to 239 JV, that he was going to vote on that moratorium and that issue was coming up at the next council meeting, even if it was only a 3-days notice?

LYNN: Not if the Perry decision is to hold. Because drawing the distinctions I believe are going to result in an unworkable solution. I understand your honor's question as to whether when he was on notice the answer is, I don't think he should have done so. The question for the court is whether or not we are going to create civil liability as a result of him doing so?

ENOCH: The question was framed in terms of duty. I guess that's where one of my questions goes. What is the duty that is claimed and does it make a difference in the legislative immunity sphere? Forget about Mr. Joe being on the city council. Just assume that Mr. Joe as a result of whatever work he was doing gains information that the city council is planning to put a moratorium on apartment building in its community and lets one of his clients know, so that that client can get a permit and attempt to get grandfathered before the moratorium, And another client of whom he is unaware but is a client of the firm does not get that information. Would there have been a duty on the part of the firm to have notified all their apartment building clients within that community of that pertinent information?

LYNN: Let me answer it two ways. It is clear to me that if a lawyer comes in and engages a person or a firm to represent them before the city council, under those circumstances I believe there would be a duty.

ENOCH: Forget about the city council. I'm just saying Mr. Joe represents an apartment builder, he's in that community. And as a result of that gains information that the community is thinking about putting a moratorium and so he gives the information to his client so his client can get grandfathered in. After that happens and the moratorium passes low and behold it turns out that Mr. Joe's firm also, a different lawyer, represents another apartment builder there who didn't get that information. Was there a duty there for the firm to have conveyed that information to that other apartment builder?

LYNN: It depends on the engagement. If somebody engages you for example on a wills and estate issue and a matter comes in reflecting some sort of change in the anti-trust laws, you may as a matter of course because of your knowledge of the client given _____ and suggest that they need to pay attention to the anti-trust decision. But I don't think you're obligated to under our present rules because the scope of the engagement was limited.

ENOCH: Let's assume that there was a duty. The firm gains information to benefit a client or not benefit a client. So assume that there's some sort of duty that that information needs to be conveyed to the firm's clients and they failed to do so. The mere fact that one of the lawyers within the firm is on the city council that ultimately will decide that moratorium, is there legislative immunity for a violation of that duty? The duty to convey information to the client does that get covered up by legislative immunity just because one of the partners in the firm happens to be on the city council that's going to vote for that moratorium?

LYNN: I believe the legislative immunity covers those persons who serve as legislators. I believe that the allegations here are derivative. That is in this circumstance there is no liability by Jenkens & Gilchrist as a result of anything that it did or did not do other than through the actions of Mr. Joe. So in that circumstance, I don't believe that Jenkens & Gilchrist can be held responsible.

HECHT: What I don't understand is if your argument about legislative immunity being absolute is correct, then why do you take the position that if Joe had been retained to represent the people before the council themselves that would be different. It looks like absolute is absolute.

LYNN: I believe that absolute is absolute.

HECHT: If he had taken the money to represent them before the council, he could have still gone in there and voted against it.

LYNN: I believe that he could. However, should he have done that? Was that the politically right decision? Could he have been voted out of office as a result of the breach of that confidence? The answer is yes. The political system permits correction for that. The ALI in the restatement suggests that the lawyer serving as a city council person should not have accepted the representation. The ALI would balance this by saying that to the extent that that offer is made, that representation is offered, then you should look to public law to determine whether or not you ought to abstain. And that leads of course I think to 171 in the Local Gov't Code.

HECHT: Which says it should. But doesn't that recognize that there's a conflict here, and the only reason to have that statute is because the legislature made a decision it's not right for a person with that direct personal interest to be voting for that interest in the public body.

LYNN: Chapter 171 was in existence long before ch. 171 was numbered 171. There was a time when municipal legislators were not covered back in the 50's. I don't remember the

precise case that changed that. But until that point local government had to be protected. My suspicion is that that statute was passed in order to give the same set or almost the same set immunity that would have governed state legislators and other legislators both in the federal and state system.

HECHT: It looks like it would be passed to keep him from voting on stuff that they are going to be compromised on.

LYNN: If that is the case, that's the legislature's duty. And ALI recognizes that it's a public law issue. The legislators can pass laws, ordinances that say when one can vote and when one can't. But that would be political.

HECHT: But the odd thing in this case is Mr. Joe could not vote for 239 JV, but he could vote against it.

LYNN: I'm not sure I agree with that. The ALI for example in the restatement says that giving special preference to one side or the other would be inappropriate.

HECHT: How come he can vote against his client but not for him?

LYNN: I believe that he can vote for his client. The restatement ALI would say that he could.

HECHT: I thought you said the statute said he couldn't.

LYNN: No. Chapter 171, if he had an interest in it that was 10%, a substantial matter, then of course he couldn't. In this circumstance, I think that the briefs have argued was that he couldn't. He did not fall within 171.

In Bogan(?) v. _____ in 1997, our position is summed up this way. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. A fear this court can eliminate by reversing and rendering the Dallas CA's decision.

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WAINWRIGHT: Mrs. Ward. Mr. Lynn, I think, indicated that if Mr. Joe were representing 239 JV in zoning matters and appeared at the city council meeting and voted against them on that very issue, that is in favor of the moratorium, that there would still be immunity. Correct?

WARD: Yes.

WAINWRIGHT: Isn't that different from the position of Senators Brown, Cain, Duncan, Ellis

and other representatives who filed an amicus brief? They cite Virginia Legal Ethics opinion that talks about representing clients on the specific matter that's before the specific governmental body. Didn't Mr. Lynn seem to take a different position from local senators?

WARD: That's possible. But legislative immunity as has been discussed previously is absolute. And even though there might be situations where it certainly wouldn't be advisable for a legislator to do what you just recounted, they are absolutely entitled to immunity from civil _____.

WAINWRIGHT: So the state agrees with Mr. Lynn and disagrees with the senators I mentioned?

WARD: The state disagrees with that particular position. This court has not being called upon today to decide the merits of the document of legislative immunity. The court has already embraced that doctrine and the policy choices that it makes and the fact that a certain bad actors might escape civil liability and the clients may not have redress...

HECHT: I don't believe we ever put it in quite those terms. We are embracing this doctrine no matter who gets screwed. 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 okay.

WARD: Legislative immunity basically allows for that to occur in some circumstances. But the greater good of having independent and effective legislators for the public outweighs that. The doctrine of legislative immunity is not to protect individual legislators but protect the public.

HECHT: Wouldn't we be better off with an independent legislator that wasn't shooting his client. It seems like that would be better.

WARD: Yes. I think it's important to note that there is no _____ this sweeping the state of attorney acting against the party client interest. And while some isolated cases could occur, civil liability simply shouldn't lie.

HECHT: When they get criticized it's for acting poor. The state doesn't think that's a good idea for legislators to act for the specific client.

WARD: No. Absolutely not.

HECHT: Because there's a conflict.

WARD: Yes. The duties that the CA has imposed absolutely conflict with a legislator's duties to the client. And the people of Texas deserve legislators that are focusing only on the public interest and not looking over their shoulders constantly to see who might sue them.

And that is exactly the result that legislative immunity is intended to protect against.

WAINWRIGHT: That is a very important obligation obviously of our elected officials and legislators. What about Mrs. _____, an attorney, the fiduciary obligation to clients? Isn't that also a very important obligation?

WARD: It is very important.

WAINWRIGHT: Are you saying we should be more one and promote the other, or is there a way to promote both?

WARD: No. Obviously we're saying here that there should be no civil liability. That people should not be able to sue their lawyers for damages if their lawyer just happens to be legislators acting in their legislative capacity.

ENOCH: My view of the legislative immunity has always been in the context of trying to get around why the legislature voted the way they did, or why the legislator voted the way they did, or you voted to stop my building and you didn't exercise rules correctly, you didn't exercise the procedure correctly, you didn't give me notice. It always dealt with some official capacity in which they were operating. I'm not sure what that means when I have a private duty to a client that I breach and it results from some activity I perform as a legislator. As a legislator I learned that my body is going to be asked to vote on a moratorium on development over which I have governing authority. I have a private duty to a developer who's developing in that community, and my private duty is to let them know that there may be an issue coming before the legislative body that could affect their development. How does it interfere in the legislative process to recognize the private duties reached might result in damages? Meaning I failed to let them know. As a result they couldn't grandfather in like everybody else knew could grandfather in. And the duty that's breached is not the fact that I voted on the moratorium, the result of that moratorium is immaterial, the duty of the breach is that I had information that my failure to convey to my client harmed my client, and that's the duty that gets breached, and that's a duty that could be measured in terms of damages. How does that hurt the state policy of keeping legislators immuned from being sued for damages that results as a result of their vote?

WARD: That's because in reality the duties that 239 JV very artfully pleaded to try to circumvent legislative immunity whose duties that you just recounted the duty to inform for example is merely the flip side of councilman Joe's decision that the moratorium was in the best interest of the citizens of Irvin, a legislative decision. All the duties at the CA that they've pleaded and that the CA upheld have a negative of those. To have complied with those duties would have meant to disavow councilman Joe's decision.

HECHT: No it wouldn't. It would be give up the client. Why can't you just give up the client?

WARD: If he had known about the client, he could have done that.

HECHT: But you wouldn't require him to do that.

WARD: No. Even if there was a breach of the duty the remedy for that cannot be a suit against him.

WAINWRIGHT: Assuming as I think parties have argued that Mr. Joe didn't know about the representation of 239 JV before the Sept. vote. And there's a meeting that he had with representatives of 239 JV in Nov. 1994. Then there's another vote in December. Even with actual knowledge there wouldn't have been an obligation to disclose to the client what he was planning to vote, how he was planning to vote, or give up the client before the December meeting even with actual undisputed knowledge of the conflict.

WARD: At that point of course the client also knew Mr. Joe's position and knew how everything was going to come out and the client still kept Jenkins & Gilchrist. To me the question could be also the client could have fired Jenkins & Gilchrist, but instead the client chose to continue with that representation with the hopes of influencing councilman Joe.

WAINWRIGHT: That may be so. My question is, what was Mr. Joe's obligation?

WARD: He had no obligation to inform the client. Absolutely none.

WAINWRIGHT: Or give up the client.

WARD: He had no obligation to do so. He of course could have done so. The firm could have done so. But there's no obligation to do so that is redressable via a suit for damages.

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RESPONDENT

PATTERSON: Before coming here today I looked at the Texas Lawyer's creed that was issued by this court in 1989, and I noted that the very first stated obligation of the lawyer is one of allegiance. And the result sought by the petitioners would appear to eliminate that duty for the lawyer/public official. The private lawyer/public official.

HECHT: So he's just supposed to vote however his client tells him
_____.

PATTERSON: I do not agree that he is to vote how the clients tell him to.

HECHT: What does allegiance means if you're not going to take the position the client wants you to?

PATTERSON: I think the lawyer has an obligation to - a reasonable lawyer, and I'm talking about someone in Mr. Joe's position with a large law firm like Jenkins & Gilchrist in Dallas with a significant real estate practice about to vote on an issue that has a direct impact on real estate developers. An impact that is different from the impact that it would have on the general public.

HECHT: If it were just higher taxes that would be different?

PATTERSON: And that is one of the points I wanted to make today. And that was that I believe this case in some ways is limited to its facts. And in part it's limited to its facts, because in this situation apart from the general public, this real estate development, our client, did have a method and an opportunity to avoid the effect of the moratorium. The general public when you're passing a tax increase or some other general legislation that applies to the general public, the general public has no method to avoid the effect of the legislation.

HECHT: They can go get a legislator to vote against it if that's their _____ can't they? Citizens against higher taxes and they go hire Jenkins & Gilchrist and they say get down there and try to stop this.

PATTERSON: That's what lobbyist do. But in this situation and it's unique is that we do believe that the private lawyer/public official - lawyers don't have special access rights to legislative office. Except for certain judicial positions it doesn't require a law license.

HECHT: Which is not legislative.

PATTERSON: Our position is if a private attorney chooses to run for public office does not mean that therefore he gives up his obligations to its private clients.

HECHT: That's going to make it pretty hard for a lawyer at a big firm to take on that kind of public service. He's going to have potentially thousands of clients to do a conflict check on every time a vote comes.

PATTERSON: It does. But I don't believe that that's any different from when a lawyer brings in a new client to the firm...

JEFFERSON: But it's not even limited to every time a vote comes up, but any bill that is before the legislature. We're sort of in a unique situation here. We can kind of compare what's going on in this court and then go across the street in the capitol. There are all kinds of bills being filed. There are a lot of lawyers in the capitol representing clients. Just in practical terms if you represented a senator who was a private lawyer but also has an obligation to the public as a senator, what would you advise him or her to do if we were to adopt a rule that you propose?

PATTERSON: I do know that from the last election cycle, and there were numerous articles, I know the petitioners cited some articles from the Texas Lawyer about this case. There were

numerous articles about conflicts. For instance, Mayor Ron Kirk of Dallas was being paid by his law firm at the same time he was mayor. And one of the articles that I saw in the paper was that they had procedures in place to protect against mayor Kirk running afoul of the interests of the firm's clients. And in this situation neither the law firm nor Mr. Joe had any procedures in place. Apparently their position is that he's absolutely immuned.

JEFFERSON: But let's look at it in broader terms. There are house bills out there right now that if I were back in private practice I would be sending all kinds of letters saying here is a piece of legislation that could impact you adversely. You might want to consider hiring a lobbyist. There are all kinds of - there's legislation that's very important, has statewide impact to both public and private concerns. And my question to you is, if you're a senator in a large firm how are you supposed to advise your client on each and every one of those and to what extent under the rule that you propose a legislator really serve in both capacities?

PATTERSON: I believe that in particular as shown by the record in this case Jenkens and Gilchrist has an e-mail system through my voice mail system, and every firm, even our firm, through our computer systems have conflict systems set up to check for conflicts. There is an AG opinion BM 309, which analyzes the local gov't code, §171, and states that the interest in the entity does not have to be a direct interest to create the conflict. And in our opinion let's say you represent dry cleaners and there's going to be legislation passed that will restrict how dry cleaners do business. And at what point if 50% of your clients are dry cleaners and it's going to affect them can you vote on that issue? We believe there's a conflict that needs to be recognized and dealt with. But even if he's immuned from the vote and he can go ahead and vote, the duty that we're complaining about in this case is the failure to even inform a client in the first instance that something is going to happen that can negatively impact them.

HECHT: So you are not complaining about how he voted?

PATTERSON: No.

HECHT: Do you concede that even though 239 JV was a client of the firm that does not require him to either vote against the moratorium, or to abstain?

PATTERSON: Our position is even if you accept their theory...

HECHT: I'm asking you about that. We're trying to get the parameters here of what this means. And in your view did the client have the right as a client to have this lawyer either abstain or vote no?

PATTERSON: Our position through our expert was that he did have a conflict situation. Because under our expert's analysis using AG opinion DM 309 was that the lawyer got 100% of his salary from Jenkens & Gilchrist. Indirectly his vote affected a client of the firm from whom they were taking fees. So according to the AG's opinion an indirect effect because the statute doesn't

distinguish between direct or indirect effect.

HECHT: The statute says you can't vote yes. Now what about no.

PATTERSON: Yes. And we believe the corollary is true that he can't vote no either. But even if there is that conflict we believe that that's irrelevant to our theory of liability. Because our theory of liability - and admittedly the moratorium passed unanimously. With Mr. Joe abstaining it would have passed anyway.

O'NEILL: How do you get over proximate cause for this event? And let's just say presuming without deciding there were a duty and a conflict and a breach of that duty, how do you get past proximate cause? And, two, my understanding is that the property was zoned as an apartment complex later and the client received some hundred thousand dollars more than they would have under this contract. How do you establish proximate cause and damages?

PATTERSON: The issue of proximate cause and damages 1) if you will note from the CA's opinion, the issue of foreseeability was not raised in the summary judgment papers. And that's why the CA states in the opinion that foreseeability is not an issue. What the evidence shows is that the client 1) incurred direct carrying costs on the property as a result of the moratorium.

O'NEILL: If everyone else would have voted anyway for the moratorium then how do you get causation?

PATTERSON: And that's why I say that this case is unique and may be a standalone case. And that is because at the time with the gov't code in effect there was a grandfathering statute that allowed property owners who had platted their property apartment not zoned, zoned did not have any effect. The property was already zoned apartment and according to the testimony that I believe is in the record, that was its best use was as apartment land. And it was already zoned apartment and they were attempting to sell it to the buyer as apartment land.

ENOCH: As I understand your complaint it is not that he voted on the moratorium. Your complaint is that he failed to notify his client that a moratorium was going to get voted on so that his client could grandfather himself in and avoid the moratorium. Your complaint is not how he voted. Your complaint is not even that he voted. Your complaint is that he had information in advance of the vote that he failed to convey to his client, not his true client, but within his firm he failed to convey the information to the client.

PATTERSON: Correct. That is our position.

O'NEILL: But I thought there was a corollary of that. That if you did not win on that, then if you didn't have a duty to disclose it and get him grandfathered in, then he had a duty to abstain. So are you now saying if we decide there's no duty on the first instance we don't need to address the other because there is no causation?

PATTERSON: I don't believe there is. Correct. And that's why I think this case is unique. And there was testimony in the record from our expert who has done municipal law and in fact had in the year prior to giving his deposition had platted some property for a car dealer in the City of Irving and knew what it takes to file a plat is not a terribly complicated involved process.

O'NEILL: Doesn't that conflict with the legislator's duty to the public? If he's just okay let me grandfather all my firm clients so we can get several apartment complexes up before, doesn't that directly conflict with his duty to the public as a legislator?

PATTERSON: Exactly. And that's the conflict he failed to recognize and deal with is that he did have a conflict.

PHILLIPS: Most bills take effect Sept. 1. So lawyer/legislator should be scanning through the bills, several thousand pending bills, and scanning through their clients and advising actions they should take between now and Sept. 1 regardless of whether they vote or not.

PATTERSON: That is probably the ultimate result is that you will have to setup some system to be aware of the effects of your votes.

PHILLIPS: _____ vote or not. I'm getting more and more confused. Do you disagree with anything in the CA?

PATTERSON: No.

PHILLIPS: You would be happy with a written opinion?

PATTERSON: Yes.

PHILLIPS: So the primary duty as you see it and what you're asking here is a duty to inform?

PATTERSON: Correct.

PHILLIPS: You really don't care about whether he voted or how he voted?

PATTERSON: I really don't.

O'NEILL: The problem I have with that is it's a duty to inform as to something that is public record. So what would be wrong with, since the client did not hire the firm for the purpose of tracking this legislation, what would be the problem with saying that 239 decided to do that itself, that it was then charged with notice of anything that was public and it should have caught it and could have caught it first.

PATTERSON: There is a quote from the restatement of lawyers. It's §20, comment C. And it says even if a client fails to request information, a lawyer may be obligated to be forthcoming because the client may be unaware of the client's knowledge.

O'NEILL: Is that dealing with public information though? That's the wrinkle here. I think most of those don't deal with information that is available to the public.

WAINWRIGHT: In addition, your expert Mr. Joe posits he didn't know what was going to be on the agenda until the night before the council meeting. I understand in your brief you go back to deposition testimony and quibble with that: your expert posits that in his opinion. So Mr. Joe at least according to your expert didn't even know that was going to be on the agenda or may not have known it was going to be on the agenda until the night before the actual vote. So in this case 239 JV could have had access through a public document to knowledge that this was going to be on the agenda before Mr. Joe knew about it. Isn't that possible?

PATTERSON: If I may I think and maybe this addresses J. O'Neill's question as well. And that is the public would be charged with constructive notice. Here we believe the law firm had actual notice.

O'NEILL: So 239 is charged with constructive notice.

PATTERSON: The posting of the notice is to provide people, the general public of notice...

O'NEILL: If they are charged with constructive notice how could there be a duty to inform them of something they have constructive notice of?

PATTERSON: The duty is because just the difference between constructive and actual. And the statement from the restatement of the law governing lawyers, the attorney can't assume that the client is aware of something negative that may happen to the client, particularly if it's material to the representation. Mr. Thau testified in his deposition if he had been aware of the moratorium that the vote was about to come up, he would have certainly informed the client and made sure they were aware of it. (SIDE A RUNS OUT).

...the law that was in effect at that time, he would have also had an obligation to inform the client as their lawyer that there was a method to avoid the effect of the moratorium by platting their property. So the information was not confidential. It was not something that Mr. Joe was prevented from disclosing to other members of the firm.

O'NEILL: You would require him to do something that would probably get him run out of office. I mean if he did a moratorium for all of his clients and grandfathered them in, he would be doing something that would be scandalous. You're saying he can't even just step down and say I'm not going to pass this on. I'm not going to sit on the vote. I'm not going to advise my clients. I'm just going to be totally neutral. You would say that would be a violation. He has a duty to

grandfather in his people, which then is going to get him run out of office.

PATTERSON: Yes. And that creates a conflict situation for the private attorney/public official. It is certainly not our position that the legislative immunity or the local gov't code completely preempts and eliminates any duties that the private lawyer/public official owes to his clients.

O'NEILL: But you have to acknowledge that if we took that sort of view very few lawyers would serve on anything?

PATTERSON: Without attempting to comply with their conflict situations, and it may require them to withdraw from representation of the client. And that's one thing that did not happen here. The issue needs to be spotted before the conflict gets to a problem. And the problem is, is when he does something that negatively impacts the client. That should have been spotted. There were no procedures in place to spot these issues. Those issues should have been spotted ahead of time.

WAINWRIGHT: Let's go back to causation. As you know your client has to establish both prongs of proximate cause. You mentioned foreseeability is not raised in the courts below. I don't know, but that's your argument. There's still but for causation and you haven't answered the question about whether with an 8 to 1, then an 8 to 0, then an 8 to 1 vote whether Mr. Joe's vote made a difference. You still have to prove but for causation. Address that issue directly.

PATTERSON: The complaint is not about the vote. We agree that the vote would have gone forward with or without Mr. Joe, and likely it would have passed.

WAINWRIGHT: Your complaint is the failure to disclose?

PATTERSON: The complaint is, which we believe in the record that the issue...

WAINWRIGHT: If your complaint is a failure to disclose how do you get to damages without looking at how the moratorium vote came out? If it had come out for your client you wouldn't have any complaint here. It came out against your client. So the vote on the moratorium is pertinent to your case. How do you get from failure to disclose to damages without going through the causation perhaps embodied in part at least in the votes.

PATTERSON: The vote becomes irrelevant if you plat your property before the vote.

WAINWRIGHT: And let's assume as your expert did, Mr. Joe knew about what was going to be on the agenda the night before. So let's assume that away without deciding. Let's just go from failure to disclose to the votes to damages. But for causation with an 8 to 1, 8 to 0, then 8 to 0 votes on the moratorium and the two extensions, the argument being made is that Mr. Joe's vote didn't make a difference so you can't plead causation. I need you to address that directly given how strong the vote was in favor of the moratorium.

PATTERSON: Our position is the client had a method to avoid the effect of the vote.

WAINWRIGHT: Let's assume there was no method to avoid the effect of the vote. Then address causation...

PATTERSON: That's why I think this case is unique is because this client did have a method to avoid the effect of the vote.

PHILLIPS: I gather this duty is to say it doesn't matter that he didn't find out about it until the night before the vote. You think he had a duty as soon as _____ or his duty under the law governing lawyers _____.

PATTERSON: First of all I believe the record shows that there is a fact issue on that. Because the testimony that our experts...

PHILLIPS: Does the lawyer/legislator have a duty to be vigilant about the docket pending before the body that he serves in?

PATTERSON: I would believe he would.

PHILLIPS: So our lawyer/legislators over in the Texas legislature need to be cognizant of all these bills and their duty is not an excuse, in fact it might be worse if there's a bill prodding through committee that would adversely affect their client, and we're not focusing on because they are busy with the budget or something important on how the courts are structured.

PATTERSON: I think there would be some obligation on the part of the private attorney/public official to focus on whether matters are going to come up that will affect the clients. Generally I think there will be no - the client will have no recourse because there's no way for the client generally to avoid the effect of a general public law.

HECHT: But if somebody puts a bill in the hopper to state what the statute of limitations is on fraud, the cases are in conflict. We don't know. Is it two years or four years? Somebody puts in a bill that says it's to be four years. You've got a client, his whole defense in the case is that the two year statute has run. That's it. Otherwise, he's exposed. There's 5,000 bills pending. You haven't paid any attention to this. A huge percentage of them don't get out of committee. After they get out of committee they've still got a long way to go. You don't know anything about it. You're hoping for the best. And as the chief says, you're worrying about budget or something else, and your client's going to come back an say later on, well but if we had known about this when that bill was first introduced, we could have gone and hired an army of lobbyists and we could have gotten the thing killed and it would still be two years and we would win our case. And you should have told us. And your position is, well maybe so.

PATTERSON: I believe that this is a very fact specific situation.

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REBUTTAL

LAWYER: We're talking here about a really important issue.

ENOCH: The discussion has been about well does a lawyer/legislator have to keep track of all the bills. But I'm going to focus your attention on your not a lawyer/legislator. You are a lawyer who represents clients in real estate development, and there are any number of bills going through the legislature that will affect your client's business. This has nothing to do with lobbying. This has everything to do with the effective date of the bill. You are aware that if your client files a plat before the effective date of that bill, they are grandfathered in. If they fail to file that plat before the effective date they are not grandfathered in and it affects their business. You know that information. It's public information. It's an enrolled bill. The information is public. It's available to the public to know. Does the lawyer have a duty to notify the client about the effective date of that bill so that they can get grandfathered in such that if they fail to do so they have breached a duty to their client?

LAWYER: I think as a matter of private tort law and private tort duty a lawyer does have an obligation to pursue the interest of the client and disclose matters to the client.

ENOCH: It might be a fact issue as to whether or not the lawyer knew or should have known about this bill that would affect their client.

LAWYER: No. I disagree with that. Because that requires you to go back in to the legislative immunity...

ENOCH: This isn't a lawyer/legislator.

LAWYER: I think there is room to sue a lawyer for a failure to read the _____.

ENOCH: And that has nothing to do with whether or not the legislature voted for or voted against the bill. It just has to do with a lawyer's obligation to notify a client so the client can avoid the effect of whatever that result will be.

LAWYER: As I understand your question, that's correct. There is a cause of action that a client might be able to articulate that asserts that the lawyer failed adequately to research the scope of the client's business.

ENOCH: Let's assume that the lawyer is a legislator, but that's the only fact that's different. The client's complaint is that what you violated was that duty to notify me at a time that I could have protected my interest. And it's public information. There's no difference about that. And there's no difference about the fact that had I gotten that information, I could have protected myself irrespective of what the vote was in the legislature. Why should the lawyer just because the

lawyer happens to be a legislator be insulated from that kind of liability?

LAWYER: We have created the notion of immunity for legislators. Not because we like legislators. Not because we like lawyers. But because we care about the way the system works. If you impose liability under that circumstance upon a lawyer or his law firm because he failed to pass along information that he acquired in the course of acting as a legislator, you are requiring that that legislator to vote his or her energy to protecting himself from answering a civil action rather than devoting his energy to the legislative process.

O'NEILL: What if that lawyer is hired specifically to track the legislation and the lawyer is a legislator?

LAWYER: Yes, I agree there would be a problem.

O'NEILL: But would there be a private cause of action? It seems like what we're dealing with is each side has taken an absolute all or nothing position. We're trying to craft something that can allow some of these things to combine. In certain situations I could see where there would be a clear conflict of interest where a cause of action should lie, and there's others where I think that there could not.

LAWYER: Under your hypothetical if a lawyer is hired to monitor legislation of course the lawyer has to exercise reasonable care in the course of monitoring that legislation. That hypothetical though we think applies to this case because...

O'NEILL: I understand that. But you would say in that situation there would be a private cause of action despite legislative immunity because there is a duty to a client to disclose actual conflicts. Should we limit it to actual conflicts, or should we put in on the client if there's public notice of these bills that they have to track it? If you could craft a middle of the road rule that might be it.

LAWYER: I think it's easier than that. And that is that a legislator cannot be hired to monitor legislation for private clients. You just can't do it.

HECHT: But you can hire his partner.

LAWYER: You can hire his partner and that throws us over to rule 1.10. The law that we all grew up with ODR 8101 said even the law firm couldn't do that. We had that old appearance of impropriety. And the ethics commissions all ruled that if there is one lawyer/legislator you cannot hire that firm to deal with the body the lawyer represents. We changed that in 1990 when we adopted 1.10. And the rule now says that the lawyer/legislator can continue to act on matters involving general regulation provided that he or she is screened, and it also says that the law firm, unlike what had been the law prior to 1990, can accept that representation provided only that they screen that lawyer/legislator.

What the CA has done in this case is they have ignored rule 1.10 and focused on rule 1.06. And they have imposed a duty on Harry Joe to get involved in the representation of private clients and they have imposed a duty on Jenkens & Gilchrist, the law firm, not to screen Harry Joe from the representation of private class. We simply cannot comply with the standard that the CA has imposed upon a lawyer/legislator and at the same time comply with what rule 1.10 tells us.

HECHT: Well respondent argues that Mr. Joe was not screened appropriately.

LAWYER: I don't think that's what they argued. I think what they argue is that this was a matter under rule 1.10. And our problem with that is this wasn't even a matter. This involved general regulation within the City of Irving.

HECHT: But if it had been is there a fact question as to screening?

LAWYER: There is not a fact question as to screening because Harry Joe is not supposed to be involved in the process.

WAINWRIGHT: It sounds like you disagree with Ms. Ward. I asked if a lawyer/legislator was hired to represent a client on a specific matter would there still be absolute immunity for that lawyer/legislator going before the city council on that matter they were hired to represent a private client on even if they took the position in conflict with that private client's position or may have harmed their private client? It sounds like you're leaning more towards the position on that point of the brief from the amicus brief from Senators Ellis, Duncan and others, and the Virginia ethics opinion.

LAWYER: The Virginia ethics opinion was decided under the old 1.01 and the appearance of impropriety standard. I don't think I'm more on Ms. Ward's side on this. The problem on Ms. Ward's side on this issue, the problem I have is you just can't hire a legislator to look after your interests before that legislative body.

WAINWRIGHT: And if you do what's the result?

LAWYER: If a lawyer is retained, if that individual legislator is retained to look after the client among the things that that lawyer can be sued for perhaps while he sits in jail is he can be sued for not properly looking after the client, not fulfilling that job. By and large lawyers are just other people. All they want to do is help. I would urge this court not to impose upon lawyers a duty that they don't impose on any other legislator and invite lawyers to do what they've done for over 200 years.