

SUBJECT: Providing immunity for legislative actions by state and local officers

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 6 ayes — Marchant, Madden, J. Davis, Goodman, Lewis, Villarreal
0 nays
3 absent — B. Cook, Elkins, Gattis

SENATE VOTE: On final passage, April 2 — 31-0

WITNESSES: None

BACKGROUND: The 5th Court of Appeals, in *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896 (Tex.App.-Dallas 2001), ruled that an official who is also a lawyer can be held liable to a private client of a law firm for a decision contrary to the client's interests even though the official was acting wholly within his or her capacity as an official. Harry Joe, the defendant in the lawsuit, was an Irving city council member and a lawyer with a local law firm. Joe voted for a moratorium on multifamily apartment developments in Irving, a decision that was contrary to the interests of one of his law firm's clients, a local developer. The client had asked Joe to oppose the moratorium or to abstain from voting. Because Joe did not follow that advice, the client sued him and the law firm for malpractice and breach of fiduciary duty. The court of appeals concluded that an attorney's duty of care includes disclosure of any conflict of interest that may affect the attorney's representation and that neither legislative nor official immunity absolves an attorney of that private duty.

The Government Code defines an appointed officer as the secretary of state; a person appointed with the advice and consent of the Senate to the governing board of a state-supported higher education institution; an officer of a state agency who is appointed for a term of office; or a member of the governing board or commission of a state agency who is not appointed and who is not otherwise an elected officer or an executive head of a state agency.

An elected officer means:

- a member of the Legislature;
- an executive or judicial officer elected in a statewide election;
- a judge of a court of appeals or of a district court;
- a member of the State Board of Education;
- a district attorney or criminal district attorney; or
- a person appointed to fill a vacancy in an office or appointed to a newly created office.

DIGEST:

CSSB 1047 would specify that an elected or appointed state or local officer, including a member of the governing body of a school district or other political subdivision, could not be subject to disciplinary action or a sanction, penalty, disability, or liability for:

- an action allowed by law that the officer took in the officer's official capacity regarding a legislative measure;
- proposing, endorsing, or expressing support for or opposition to a legislative measure or taking any action allowed by law to support or oppose a legislative measure;
- the effect on any person of a legislative measure or of a change in law proposed by a legislative measure; or
- a breach of duty, in connection with the member's practice of or employment in a licensed or regulated profession or occupation, to disclose information, or to obtain a waiver or consent from any person, regarding the officer's action on a legislative measure or the substance, effects, or potential effects of a legislative measure.

The bill would define a legislative measure as:

- a bill, resolution, order, or other proposal to adopt, enact, amend, or repeal a statute, ordinance, rule, or policy of general application;
- a proposal to adopt, enact, amend, repeal, or grant a variance or other exception to a zoning ordinance; or
- a proposed constitutional amendment or charter amendment subject to a vote of the electorate.

A legislative measure applied to a class or subset of people or matters that

was defined in general terms without naming the particular people or matters would be a measure of general application.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSSB 1047 would prevent unfortunate ramifications from the Dallas Court of Appeals ruling in *Two Thirty Nine Joint Venture v. Joe*. As it stands, the ruling would require any legislator to inform every private client or every client of his or her law firm of any issue that came before the lawmaking body that could affect those clients, which would be burdensome. Also, every vote cast by a legislator who also was a lawyer could become a potential claim of malpractice and breach of fiduciary duty.

The current lack of protection for state or local officers could make them reluctant to perform their duties in certain circumstances and could undermine their independence. Legislators should be free to vote for what is in the public's best interest, rather than what is in the best interest of their clients. The bill would clarify what it means for an officer to act within his or her legislative capacity and, therefore, to be immune from liability.

The bill would protect not only officers who also are lawyers but also would apply to any state or local official who also was a member of any licensed or regulated profession.

**OPPONENTS
SAY:**

Members of licensed or regulated professions who also are legislators should be held to the same standards as are other members of those professions. It would be inappropriate and unfair to their clients to give those professionals immunity from breaches of their professional duties.

NOTES:

The Senate engrossed version of SB 1047 would not include a member of a governing body of a school district or other political subdivision within the definition of state or local officer.