



Troubling Procedural Irregularities Brought to Light on the Dallas Court of Appeals

By Rebecca Ward Helterbrand, TLR Outside Counsel

Something strange is going on behind closed doors on Texas' Fifth Court of Appeals in Dallas.

In concurring opinions for two recent cases, Justice David Schenck revealed internal procedural irregularities occurring within the court. According to Schenck, the majority took questionable procedural actions that demonstrate a recurring abuse of power, which he characterized as "obstruction." Let's take a closer look at one of those cases.

Steward Health Care System LLC v. Saidara

The procedural issues in this case arose when non-panel justices prevented the release of a three-justice panel's opinion.

The parties to this appeal last filed briefs in June 2019 and—pursuant to normal court procedures—the case was argued to a randomly assigned three-justice panel in October 2019. Originally, the panel consisted of Schenck and Justices Bill Whitehill and Leslie Osborne.

Schenck revealed that about ten months after oral argument, Osborne, who was assigned to author the panel's decision, circulated an opinion contrary to what the three justices discussed at their post-argument conference. Accordingly, a further conference took place in September 2020, and Osborne agreed to consider material revisions to her draft opinion. Whitehill then lost his reelection bid in November 2020, meaning his service on the court would conclude at midnight on December 31.

Three days after the general election and over a year after oral argument, Osborne responded to questions raised in the September conference. On Nov. 23, 2020, it became clear a new majority opinion was necessary. That opinion was circulated and approved on Dec. 9, 2020, and a dissent was finalized before December 31.

The panel's decision, thus, was made before Whitehill's term ended, *yet the court refused to release it in accordance with standard operating procedure*. Instead, the chief justice designated a new justice to serve in Whitehill's place, altering the panel's vote count. Then the court voted to reconsider the case *en banc* in February 2021, meaning the entire 13-member court would re-hear the case.

According to Schenck, these efforts were contrary to the rules of appellate procedure and were not authorized by internal court operating procedure, allowing the majority to obstruct the panel's right to release its decision late in 2020. Schenck notes that a reasonable observer could conclude the *en banc* reconsideration not only further delayed resolution of the case, but was an attempt to conceal efforts to change the panel's results.

More concerning, when Schenck circulated a draft opinion suggesting the majority may have engaged in unethical behavior, he "*received entreaties urging—notwithstanding the facts or law—that he withdraw [the incriminating] part of [his] opinion*" in exchange for the other justices changing their votes in line with the original panel's decision.

This offer to change the court's decision in exchange for Schenck's silence is a clear violation of the parties' due process right to have their case decided on the merits, not based on "horse trading."

It is highly unusual for a judge to reveal the internal procedures (and conflicts) of a court. In bringing these issues to light, Schenck wrote, "I find myself in the unenviable position of being legally and ethically compelled to disclose to the parties my objections to irregularities in the process by which this case was decided," and that, "my duty to uphold and defend the [C]onstitution forbids me to acquiesce or to appear complicit in a process that I understand to violate it and compels me to take corrective action." ■

Justice David Schenck

Justice David Schenck is a skilled and competent judge with over 25 years in private practice and government service. He has been a justice on Dallas' Fifth Court of Appeals since his appointment by Gov. Rick Perry in 2015.

Schenck was a law clerk for U.S. Fifth Circuit Court of Appeals Chief Judge Henry A. Politz, a partner at Hughes and Luce LLP and Jones Day and a member and chair of specialized litigation and advanced motion practice at Dykema Gossett. He is board certified in civil appellate law.