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Splintered En Banc Fifth Court of Appeals Withdraws 2018 Panel Opinion after Settlement

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Just two weeks ago, a deeply splintered *en banc* Fifth Court of Appeals made the unusual decision to withdraw a panel opinion in a case that settled after the panel's decision. This case involves interesting questions about the Texas Election Code, judicial power and the public interest in stare decisis.

The merits question is this: Does the Texas Election Code permit a trial court to render a default judgment in a suit challenging a candidate's eligibility for office? In December 2018, the panel answered no and issued mandamus relief requiring the judgment to be set aside as void.

The en banc majority, however, construed the governing statutes differently. It concluded the suit was not yet ripe, and vacated and withdrew a December 2018 panel opinion authored by Justice David Bridges (and joined by justices Ada Brown and Jason Boatright, who are no longer on the court). Of note, the parties settled their dispute after the panel decision but before the en banc court's ruling.

The 7-5 decision resulted in five writings:

- a memorandum majority opinion penned by Chief Justice Robert Burns on the withdrawal of the panel opinion;
- a concurring opinion authored by Justice Ken Molberg (joined by the chief justice and justices Leslie Osborne, Robbie Partida-Kipness, Amanda Reichek, Erin Nowell and Cory Carlyle) focused on the Texas Election Code;
- a concurring and dissenting opinion issued by Justice Bridges (joined by justices Lana Myers, David Evans, Bill Whitehill and David Schenck) also on the statutory questions;
- a dissenting opinion written by Justice Whitehill (joined by Justice Bridges) regarding withdrawal of the panel opinion;
- and a dissenting opinion registered by Justice Schenck (joined by justices Bridges and Evans) on both issues.

Justice Bill Pederson did not participate in the decision.

These opinions reflect serious substantive and jurisprudential disagreements about statutory construction, mootness and judicial power. Though the disagreements are sharp and the opinions pull no punches, the writings reflect the type of reasoned airing of views litigants and lawyers should expect when an appellate court goes en banc. And in so doing, the opinions provide important guidance on a practical issue: What should happen to a panel opinion when a case settles after the opinion has issued?

When a case settles after an adverse appellate decision, clients often ask: Can we get rid of the opinion?

The relevant rule is Texas Rule of Appellate Procedure 42.1(c). It allows the appellate court to "determine whether to withdraw any opinion it has already issued" after the parties reach a settlement. As the court explained, the standard is discretionary, focused on "the public interest in stare decisis."

Cautioning that judicial decisions are "presumptively correct and valuable to the legal community as a whole," the court observed that these decisions "are not merely the property of private litigants."

The court synthesized the standard in this way: A panel decision "should stand unless a court concludes that the public interest would be served by a vacatur." The court then concluded that the "a majority ... has determined the public interest is best served by vacatur" of the panel opinion.

The reasons for this public-interest conclusion are spelled out in a separate concurrence by Justice Molberg – and joined by the Court's seven-member majority – focused on the statutory-construction question. Among other points raised, the en banc majority expressed concern that leaving the panel decision on the books could result in "significant practical mischief" in future elections.

Justice Schenck filed a vigorous dissent on both the withdrawal and statutory questions. This dissent opened by noting that the en banc court withdrew a panel opinion "though no party has requested it." Justice Schenck expressed several concerns about the sua sponte action, focused on the lack of explanation for the opinion's withdrawal, jurisdictional principles and the governing law. The dissent observes that the court never explained the public interest in vacating the decision, "leaving the reader to surmise its rationale."

According to the dissent, no court "has ever suggested that disagreement with a panel decision … is a proper basis for withdrawing the opinion." After all, Justice Schenck observed, "we could simply begin perusing the pages of the Southwest first, second, and third reporters to remove those pages we disapprove of." In Justice Schenck's view, once the court "lost plenary subject-matter jurisdiction," "we cannot exercise subject-matter jurisdiction over the merits." And the court lost jurisdiction when the parties settled.

The dissent concludes that the "public interest" supports leaving the panel decision in place, not withdrawing it. Justice Schenck thus dissented from the court's decision to "withdraw a panel opinion in which the case became 'moot' after its issuance."

Justice Schenck along with Justices Bridges (the panel opinion's author) also wrote separately to provide their views on why the panel majority correctly resolved the default-judgment question.

Justice Whitehill also dissented to the withdrawal of the opinion. Grounding his dissent in jurisdictional principles, Justice Whitehill concluded: "Since we no longer have subject matter jurisdiction, the rt should not withdraw the panel opinion."

This is an unusual case, no doubt. Only one of the original panel members remains on the court. A number of new justices joined the court after the panel's decision. And the court has been doing more en banc work since then.

The substantive issue – the construction of election statutes – is of great public importance and will continue to arise in future elections. And the opinions provide critical practical guidance when a case settles after an opinion is issued to the public.

The court's vigorous debate and thoughtful opinions on statutory construction, election law, the public interest and judicial power contribute to the development of the law and will help lawyers across the state navigate these important questions.

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