COMMENTARY AUG 11

A political shift in the Dallas court of appeals could have big impact

David Coale, Contributor

"Lawyers spend a great deal of their time shoveling smoke." So said the eloquently blunt Justice Oliver Wendell Holmes. This axiom comes to mind for us now in looking at the changed political makeup of the Texas 5th District Court of Appeals at Dallas and recent opinions that offer the first glimpses of how quickly the law here could shift.

Disagreements are emerging among the justices on fundamental ideas about what the law is and how to decide cases. These disagreements are falling along political lines, with new Democratic justices helping to form majorities and Republican justices writing separate opinions to express their disagreement. The effect could be significant. The Dallas court of appeals decides thousands of cases, and it essentially has the last word on Texas law.

Consider the case of Phillips vs. Clark. It involved a lawsuit by Kaufman County Commissioner Ray Clark against Skeet Phillips, a challenger in the Republican primary.

Clark alleged that Phillips defamed him in a political mailer and in an article posted on the website of a Texas nonprofit. Phillips asked the trial court to dismiss the lawsuit, but the trial court denied that request and kept the lawsuit alive. Phillips then appealed to the Dallas court of appeals.

The Dallas court of appeals first had to decide whether Phillips could even appeal at that point, because ordinarily you must wait until your case is over to appeal. Phillips claimed that a special Texas statute allowed him to immediately appeal. Under that statute, immediate appeal is available if "a member" of the "media" asks to dismiss a lawsuit based on free speech or free press rights, or if someone whose speech appears in the "media" does so.

Justice Bill Whitehill (Republican) agreed with Justices Amanda Reichek and Ken Molberg (Democrats) that Phillips could not immediately appeal under the statute. But he wrote a separate opinion to explain that he disagreed with their methods. He thought it was clear that Phillips did not seek dismissal based on free speech or free press rights, and so it was unnecessary and improper for the court to decide whether Phillips was a member of the media or if the political mailer and nonprofit website were "media."

Whitehill's view that judges "should not reach issues we do not need to reach to decide a case" reflects a particular judicial philosophy. It goes to the proper role of courts and the exercise of their power. Reichek and Molberg disagreed that the court could actually have decided the case on narrower grounds. So maybe they agree with Whitehill's call for restraint.

Even so, the contrast in end results is striking. Whitehill favored a decision that was relatively specific to the facts of the case at hand, meaning the law for now would take just a baby step forward in its development. If he had to decide the bigger issue, he would have ruled that a nonprofit website is "media" based on the dictionary definition of that word.

By contrast, Reichek's opinion makes a relatively broad pronouncement: Under Phillips vs. Clark, we now know that a "member" of "the media" does not include everyone "who merely opines on the issues of the day" in an era when anyone "with an internet connection has the ability to publish." She also concluded that a nonprofit website is not "the media" based on public policy considerations.

Similar issues were at play in another case of disagreement between these justices, Erdner vs. Highland Park Emergency Center, LLC. It ultimately came down to what the meaning of "related to" is.

Highland Park Emergency Center sued one of its managers, Jeffrey Erdner, for allegedly trying to steal a business opportunity from the company. He tried to dismiss the lawsuit under a Texas statute that allows for quick dismissal based on the exercise of free speech about "issue[s] related to … health or safety." The court had to decide whether Erdner's conversations with investors about opening a new emergency room in Fort Worth "related to" health or safety.

Molberg and Reichek again looked at the public policy consequences and said it would be a "potentially absurd result" if all private business discussions involving the offering of health care services were protected speech, and they did not think the Legislature intended that. Whitehill disagreed. He said "related to" had a broader meaning and, citing the Texas Supreme Court, that speech needed only a "tangential" relationship to health or safety to get the statute's protection. Again, he looked to dictionary definitions, concluding that "tangential is a common word that conjures wispiness." Sort of like smoke, perhaps?

Kidding aside, these disagreements are important because they reflect core debates about how judges should decide cases. Do public policy considerations matter in interpreting statutes and trying to figure out what the Legislature meant, or dictionary definitions of the words on the page? Interestingly, Molberg and Reichek did not cite a single dictionary in these cases. Whitehill, meanwhile, gave just a polite nod to policy considerations, explaining, "[i]t is the Legislature's job to narrow [a] statute's reach."

Justice Holmes famously said the law is just "prophecies of what the courts will do in fact." The crux is that a changed court, and disagreement over fundamentals, makes it harder to predict where the law is headed.

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