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Opt for Efficiency Over Prolonged Deadlock at Pa. High Court

The issuance of criminal charges against one of its justices has once again left the Supreme Court of Pennsylvania without its full complement of seven decision-makers.

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2012-06-12 12:00:00 AM

The issuance of criminal charges against one of its justices has once again left the Supreme Court of Pennsylvania without its full complement of seven decision-makers. On May 18, the Allegheny County District Attorney's Office filed a criminal complaint against Pennsylvania Justice Joan Orié Melvin. Later that same day, the Pennsylvania Supreme Court issued an order relieving Orié Melvin "of any and all judicial and administrative responsibilities as a justice" pending further order of court.

It is impossible to predict how long it will take before the criminal charges are resolved, but if the charges proceed to trial, it is reasonable to expect that the case could take up to a year before the process concludes. And if Orié Melvin is found guilty at trial, it is very likely that it would take far longer than a year from now for a replacement justice to take his or her seat on Pennsylvania's highest court.

The purpose of this month's column is not to urge Orié Melvin to resign immediately or to prejudge the strength of the charges against her. As do all citizens, Orié Melvin has the right to assert her innocence and to put the prosecution to the burden of proving its case against her. Moreover, if Orié Melvin is found not guilty or if the charges are dismissed, she should be able to resume serving on Pennsylvania's highest court.

In the interim, however, Pennsylvania's highest court faces an unpalatable choice. The role of the Supreme Court is to hear and decide the most important and most difficult questions of Pennsylvania law. Not surprisingly, many of the cases that the Supreme Court decides are resolved by a 4-3 margin.

After an appeal is orally argued at Pennsylvania's highest court, the justices discuss the case at a conference, during which the justices engage in a tentative vote and the majority opinion is assigned to one

of the justices in the majority. In cases where the tentative vote was 4-3 with Orié Melvin in the majority, but no ruling has yet issued, the court is now evenly divided, 3-3.

In those cases in which Orié Melvin had cast the deciding vote but no decision has yet issued, the Supreme Court must now confront how it should proceed. On the one hand, the court could opt to indefinitely suspend issuing its decision in the case until a seventh justice is available to break the tie that currently exists. Or, in the alternative, the court could opt to issue a perfunctory order stating that the decision under review is affirmed by an equally divided court, which would constitute a resolution that lacked any precedential value.

In my view, Pennsylvania's highest court should opt for efficiency over prolonged deadlock in the current unfortunate circumstances with regard to cases in which the remaining six justices are currently deadlocked 3-3. In other words, in cases in which the absence of Orié Melvin's vote renders the court evenly divided, the court should simply issue a perfunctory order stating that the decision under review is affirmed by an evenly divided court instead of holding these cases indefinitely, facing possibly a year or more of additional delay before a definitive resolution can issue.

Although Pennsylvania's highest court rightly views its role as providing definitive answers to important and controversial issues of Pennsylvania law, the fact remains that these issues arise in the context of cases involving actual litigants. For actual litigants, years and years of delay in receiving definitive resolution of a case can have serious consequences. The parties or key witnesses may die. Memories fade. Evidence becomes stale. Expenses continue to grow and grow.

Pennsylvania's highest court is surely aware that the cases pending before it involve real people and real companies for whom time is often of the essence. The inability of Pennsylvania's highest court to arrive at a definitive resolution of a case in which the court is evenly divided is certainly not the fault of the litigants, and therefore the litigants should not be punished by having to wait indefinitely until a tie-breaking seventh vote once again becomes available at the court.

Orié Melvin's absence no doubt has increased the workload of each of the remaining six justices with respect to the cases that are not the subject of a 3-3 deadlocked vote. Holding deadlocked cases indefinitely into the future will only serve to ensure that the court will remain behind in its work for many, many years to come, while disposing of those cases promptly will ensure that the court operates more efficiently now and remains efficient in the future.

What I propose is that the court's chief justice promptly circulate to the other five justices a list of the cases otherwise ready for decision in which Orié Melvin's absence causes the court to be evenly divided as to the result. The memo should provide the other justices with several weeks in which any justice can change his or her vote based on further consideration of the case. Following that period, however, if the court remains evenly divided, the court should simply issue a perfunctory order in those cases stating that the judgment under review is affirmed by an equally divided court instead of holding the cases indefinitely pending arrival or return of a seventh justice.

The unpalatable situation that the justices continuing to serve on Pennsylvania's highest court now face was not of their choosing. But now those justices do have a choice. They can opt for prolonged deadlock in cases where the court is now evenly divided. Or they can opt for efficiency by disposing of those cases promptly by means of orders affirming those cases by an equally divided court. Because litigants deserve to have their cases decided in a timely manner, I hope that the six remaining justices will opt for efficiency over paralysis under the unfortunate circumstances now facing Pennsylvania's highest court. •

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