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## Where Texas AG's Securities Fraud Case Stands After 5 Years

By **Michelle Casady**

Law360 (April 21, 2020, 8:59 PM EDT) -- It was five years ago this week when two high-profile Houston criminal defense attorneys were sworn in as special prosecutors to investigate a complaint accusing Texas Attorney General Ken Paxton of violating state securities laws.

After Paxton was formally accused in an August 2015 felony indictment of failing to inform those he recruited to invest in a technology company that he would be paid a commission, the case became mired by contentious fights over venue and prosecutor pay, **appeals**, Hurricane Harvey and, most recently, a pandemic. But the charges remain before a Harris County District Court judge.

Judge Robert Johnson must now decide **a renewed fight** between the parties: Did the Collin County judge who sent the case to Houston for trial three years ago have authority to do so? The judge heard argument on that question in December but hasn't yet ruled.

Delays in the case have stemmed from issues raised both by the defense team and the special prosecutors. While fading memories and aging evidence could concern the prosecutors, the defense team has other interests to weigh when it comes to the stalled litigation, said Jeff Vaden of Bracewell LLP, who practices white collar defense and is a former assistant U.S. attorney.

"Many times, the longer a case hangs around, it wears on the defendant. Reputational damage, it lingers," he said. "But in Mr. Paxton's case, he seems to be someone who has kind of weathered that storm. He's a sitting attorney general. You don't hear much press about the pending criminal case at all."

Counsel for Paxton and the special prosecutors declined to discuss the case.

Here, Law360 looks at where the case stands and the twists and turns that got us here.

### **Awaiting a Ruling On Venue**

Paxton's attorneys filed motions in July asking Judge Johnson to send the case back to Collin County, where Paxton lived for years and where he represented constituents as a state senator.

"I think Mr. Paxton's lawyers think that Collin County is a far better venue to litigate this case as opposed to Harris County," Vaden said. "For Mr. Paxton, that's his home county. In lawsuits, just like in sports, if you can avoid playing an away game, you do so."

When Judge George Gallagher granted prosecutors' motion to change venue in March 2017, the defense team argues, he didn't have jurisdiction over the case anymore, so the order is void. Paxton argues Judge Gallagher's appointment to the case — which happened after the initial Collin County judge assigned to the case recused himself — expired on Jan. 2, 2017.

The special prosecutors have argued Paxton failed to preserve that argument because he didn't raise it with Judge Gallagher when the judge issued the order transferring the case. But even if it was preserved, the argument would fail because Judge Gallagher's authority over the case didn't expire until the transfer order became final, they argued.

The venue argument is "meritorious," said white collar criminal defense attorney Richard Roper of Thompson & Knight LLP, who served as U.S. Attorney for the Northern District of Texas for four years and as an assistant U.S. attorney there for 16 years.

"Our whole Texas Constitution is set up where defendants have a right to be tried in the county where it happened," he said. "I don't think it's a hypertechnicality for them to ask to be tried in Collin County. ... I don't think it's inappropriate to re-urge that."

Judge Johnson took the matter under advisement following the December hearing.

Whatever the judge's decision is, an appeal can be expected, said David Kwok, an associate professor on white collar crime at the University of Houston Law Center.

"Given the history of this case, I hate to make predictions on next steps," he said. "But yes, it seems like the parties are not shy about the appellate process."

### **Drawbacks of a Stalled Case**

While the hurdles that could hinder a long-delayed criminal trial aren't as much of a concern in white collar cases, Vaden said, special prosecutors in this case could have a different worry once the case makes it before a jury.

White collar criminal cases like Paxton's are more document-intensive than other criminal cases, so the delay in taking the case to trial won't hurt prosecutors as much as it could in a case reliant on witness testimony and sharp memories of the events in question, Vaden said.

But the lagging nature of the case could present a problem of optics.

"As it ages ... in the back of a juror's mind, they might think this case is 5 years old and it hasn't impacted [Paxton] from doing his job as attorney general," he said. "At some point a jury may go, it's been five years, maybe six by the time it comes to a verdict, if [the case] becomes less important in their mind there could be an acquittal, or a vote not to hold him responsible."

And at some point, the delay could be prejudicial enough to merit dismissal, Roper said.

"The whole case has gone on so long it's, in my estimation, snakebit," he said. "It's unfair just to have this hanging over the attorney general's head for this long, outrageous time."

Careful to note he has "a lot of respect for the prosecutors," who he said are "really talented lawyers," Roper said he wondered whether the case was "improvidently prosecuted to begin with," noting Paxton defeated federal claims and was reprimanded by the state securities board.

"It just seems to me like prosecutors should exercise their discretion and move down the road," he said.

For now, the delays aren't enough to rise to the level of a violation of one's right to a speedy trial, Kwok said. It's important not to lose sight of what the goal of the prosecution is, he said.

"If the goal is to protect potential investors, you might say given this litigation, it seems very unlikely our attorney general is going to be selling stock to any individuals at this point," he said. "So to that narrow question, it seems like the litigation is serving some purpose at this point. Most people aren't really thinking about taking investment advice from our attorney general."

### **How We Got Here**

Paxton, who took office in January 2015 and was elected to a second term in 2018, has been fighting related allegations of securities fraud since 2014 when he was still a state senator campaigning for the job of the state's top lawyer.

The Texas State Securities Board **slapped Paxton** with a \$1,000 fine and a formal reprimand in May 2014 for illegally soliciting clients on behalf of an investment firm and accepting a portion of management fees charged to the new customers.

He **was indicted** in the state case, which also includes a charge of failing to register as an investment adviser, in 2015. Collin County District Attorney Greg Willis, a friend and former business partner of Paxton's, recused his office from involvement in the case, which led to the **appointment of the special prosecutors**. Collin County District Judge Chris Oldner, who initially presided over the case, also recused himself, which led to the appointment of Judge Gallagher in July 2015.

Then in April 2016, Paxton **was sued** by the U.S. Securities and Exchange Commission, which accused him of promoting the stock of technology company Servery Inc. without telling investors he was getting commissions for recruiting them. In March 2017, U.S. District Judge Amos Mazzant III **dismissed the case**, finding Paxton owed no fiduciary duty to the investors.

In the state case, prosecutors convinced Judge Gallagher that because of Paxton's ties to the area and allegations of jury pool tainting, the proceedings needed to be transferred to a new venue to ensure fairness.

The defense team then **convinced the Fifth Court of Appeals** that Judge Gallagher didn't have authority to stay on the case after sending it to Harris County, resulting in the **transfer to Judge Johnson** in June 2017.

That's when a thorny dispute over how much the special prosecutors would be paid began. They signed on under an agreement they would be paid \$300 an hour — a steep discount from their market rates. But in litigation prompted by a Paxton supporter and Collin County resident, courts eventually determined that appointed prosecutors had to be paid in line with Collin County's fee schedule, which provides a flat rate for the more routine work public defenders and others typically handle. The county's fee schedule has a provision allowing for deviations from flat fees in the event of "unusual circumstances," but the Fifth Court of Appeals determined such deviation violates a provision of the Texas Fair Defense Act.

In November 2018, the Court of Criminal Appeals **agreed the hourly rate was unlawful** and ordered the trial court to vacate an order requiring the county to pay the special

prosecutors hundreds of thousands for the work they'd done on the case.

Kwok noted how unusual it was for the fight over fees to come before a verdict.

"A lot of times, this doesn't occur until after the case ... and usually those fights don't last that long because the attorneys are tired already from the litigation itself," he said. "To have this process occur beforehand, obviously it's slow and very unpleasant."

The motion practice involved with the fights over pay and venue are part of the "confluence of rare events" that have caused a case that would typically last about two years to drag on for more than five, Vaden said.

"Many cases have one unique thing about them. This one has three or four," he said.

And the pandemic will likely result in additional delays for getting motions heard or resolving the venue issue, he said.

"We may never see another case that has all the different delay mechanisms — and righteous ones — that this case does."

The state is represented by Brian Wice, Kent Schaffer and Nicole DeBorde.

Paxton is represented by Dan Cogdell of Squire Patton Boggs LLP and Philip H. Hilder, Q. Tate Williams and Paul L. Creech of Hilder & Associates PC, William B. Mateja of Sheppard Mullin Richter & Hampton LLP, Heather J. Barbieri of Barbieri Law Firm PC and J. Mitchell Little of Scheef & Stone LLP.

The case is Texas v. Warren Kenneth Paxton Jr., case numbers 1555100, 1555101 and 1555102, in the 177th District Court of Harris County, Texas.

--Editing by Aaron Pelc and Emily Kokoll.