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FAST FIVE

RHODE ISLAND APPELLATE PRACTICE

Five Appellate Mediation Practice Tips from the Hon. Frank J. Williams, Chief Justice, Rhode Island Supreme Court (Ret.)

This special edition of the Fast Five on Rhode Island Appellate Practice features a Q & A with retired Rhode Island Supreme Court Chief Justice Frank J. Williams. Since his retirement in 2008, Chief Justice Williams has served as a mediator with the Rhode Island Supreme Court Appellate Mediation Program, a program that the Supreme Court implemented during his tenure as Chief Justice in 2003. He also mediates and arbitrates cases privately at the request of parties. Participation in appellate mediation is mandatory for most cases that come before the Court. *See* R.I. Sup. Ct. R. App. P. 35. The Appellate Mediation Program has a success rate of resolving more than fifty percent of the cases that come before it. For more information about the Appellate Mediation Program, including Appellate Mediation forms, please see http://www.courts.ri.gov/AppellateMediationProgram/default.aspx or R.I. Sup. Ct. R. App. P. 35.

(1) If you were representing a party that prevailed in the Superior Court and is now the appellee on appeal, how would you impress upon him or her that appellate mediation is worthwhile?

Chief Justice Williams: "I would emphasize to my client that simply because he or she prevailed in the Superior Court does not mean that he or she will prevail on appeal. In cases in which the judgment is more than what the party expected to be awarded, there is more room for give and take in the spirit of mediation. It costs nothing to mediate a case through the Appellate Mediation Program and parties have nothing to lose by participating. In fact, they have the

advantage of not needing to order the transcript of the Superior Court proceeding while the mediation is pending."

(2) How could attorneys better prepare themselves and their clients for appellate mediation?

Chief Justice Williams: "By the time they reach the appellate mediation process, counsel are already familiar with the merits of the case but they should remember that merits, by themselves, do not resolve cases in mediation. Attorneys need to think outside the merits and have realistic discussions with their clients about their client's expectations. Attorneys should come to appellate mediation with an understanding of what it will take for their clients to resolve the case. Sometimes, the answer is not monetary in nature. An apology may even suffice."

(3) What should attorneys expect when they appear for appellate mediation?

Chief Justice Williams: "Attorneys should always expect a level playing field when they appear for appellate mediation. The mediator is not there to take one side or the other, nor is the mediator there to decide the case. Attorneys should expect that the mediator may wish to speak with his or her client alone. Attorneys should place their trust in the mediator and the process and remind their clients to do the same. Attorneys should also be prepared for multiple mediation sessions if the mediation has not reached an impasse."

(4) What information do you look for in the parties' confidential mediation statements?

Chief Justice Williams: "It is important that the parties' mediation statements include a brief factual overview of the case because, as mediators, we do not have the record before us. It is also important for the mediator to understand from the mediation statements, the parties' state of mind and their bottom line."

(5) Do you agree that there are some cases that do not lend themselves to resolution through appellate mediation?

Chief Justice Williams: "Reluctantly, yes. There are some cases that do not lend themselves to resolution through appellate mediation. Some examples are pro se cases (unless the pro se is also an attorney), post-conviction relief cases and petitions for writs of certiorari when there is no final judgment. Some mediators believe that cases in which there are numerous parties may be inappropriate for mediation but I would try to mediate those cases too. Another category of cases which are likely inappropriate for mediation are cases of first impression in which a party needs or wants a determination from the Supreme Court on an issue of law. Insurers, for example, sometimes need a determination on the state of the law on a particular issue, which mediation is unable to offer."

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