RHODE ISLAND Lawyers Weekly

May it please the new Rhode Island Supreme Court

By: Nicole J. Benjamin January 22, 2021

For the first time in a decade, the Rhode Island Supreme Court is newly composed. Justices Melissa A. Long and Erin Lynch Prata join their colleagues, Chief Justice Paul A. Suttell and Justices Maureen McKenna Goldberg and William P. Robinson III, after their confirmation to seats vacated by retired Justices Gilbert V. Indeglia and Francis X. Flaherty.

As the world ushers in a new year, the Rhode Island judiciary ushers in a new era and many firsts, including the first person of color to serve on the high court and the first time the five-member court will be majority female.

When Justices Long and Lynch Prata take the bench this spring term, court watchers will be on the lookout for change, however slight. But there are a few hallmarks of the court over the past decade that, as an appellate practitioner, I hope will remain mainstays in this next era.

1) Footnotes laden with practice pointers

Buried within the footnotes of the Atlantic Reporter are some of the most important rules governing Rhode Island trial and appellate practice.

In recent years, the Rhode Island Supreme Court has developed a practice of sending admonitions and reminders to practitioners, largely through the footnotes of its decisions, on not only the court's rules, but its expectations for trial and appellate practice. The court's commentary provides a window into the matters that concern the court and is replete with words of wisdom and caution.

Some examples include: Vicente v. Pinto's Auto & Truck Repair, LLC, 230 A.3d 588, 592 n.1 (R.I. 2020) (where the plaintiff acknowledged he was "guilty" of "[b]luffing about expert witnesses" and stated that such practice is the norm in Rhode Island, the Supreme Court noted that it read the word "bluffing" to involve a lack of candor to the court and opposing counsel and instructed trial judges to root out such improper conduct whenever possible); Archetto v. Smith, 179 A.3d 144, 144 n.3 (R.I. 2018) (reminding practitioners that "no authority exists for the filing of a motion to reconsider"); Manning v. Bellafiore, 139 A.3d 505, 520 n.11 (R.I. 2016) (cautioning that it is a violation of the Rules of Professional Conduct to offer evidence knowing that a witness is providing false testimony); State v. Brown, 62 A.3d 1099, 1105 n.6 (R.I. 2013) (reminding that making comments to the press about jury deliberations is strictly prohibited).

2) A place where everyone knows your name

For appellate practitioners, the seventh floor of the Frank Licht Judicial Complex (no, not Cheers), is a place where everyone knows your name. As a byproduct of a court in the smallest state with long-serving justices, a certain level of collegiality and familiarity has developed between the five members of the bench and Rhode Island's teeny tiny appellate bar.

Although always professional and respectful, the familiarity between the bench and the appellate bar occasionally results during oral argument in a personal aside, a warm welcome to a lawyer making his or her first appearance before the court, or even a colloquy about another time counsel appeared before the court.

The relationship between the court and the appellate bar is special and valued.

3) Judge per curiam is mostly dead

Over the past decade, the justices of the Rhode Island Supreme Court have largely put to rest a practice that their predecessors had adopted with greater liberality. Unsigned opinions bearing the label "per curiam," meaning, by the court, were commonplace in Rhode Island Supreme Court jurisprudence in the 1990s and early 2000s, at a time when the court had a heavier caseload.

Compare 2003 Rhode Island Judiciary Annual Report at 22 with 2019 Rhode Island Judiciary Annual Report at 27. However, over the past decade, the practice of issuing unsigned opinions, with rare exceptions, has ceased.

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The practice of issuing per curiam decisions by no means was limited to the Rhode Island Supreme Court. Per curiam decisions have been issued with such frequency that "Per Curiam" was dubbed by some as "[t]he most famous opinion-writer in the history of American courts." Richard Lowell Nygaard, "The Maligned Per Curiam: A Fresh Look at an Old Colleague," 5 Scribes J. Legal Writing 41, 50 (1994/1995).

But in Rhode Island, the practice has largely ceased over the past decade.

The rare exceptions nearly all concern the regulation of the practice of law, attorney conduct or judicial conduct. See, e.g., In re Paplauskas, 228 A.3d 43 (R.I. 2020); In re Estate of Brown, 206 A.3d 127 (R.I. 2019); In re A.S., 173 A.3d 1280 (R.I. 2017); In re McKenna, 110 A.3d 1126, 1130 (R.I. 2015); In re Vose, 93 A.3d 34 (R.I. 2014); In re Webb, 58 A.3d 150 (R.I. 2013); State v. Howard, 23 A.3d 1133 (R.I. 2011); In re Registration by the Law Offices of James Sokolove, LLC, 986 A.2d 997 (R.I. 2010); UAG West Bay AM, LLC v. Cambio, 987 A.2d 873 (R.I. 2010).

4) Appellate mediation

The Appellate Mediation Program was established in 2003 and has had considerable success over the past decade.

Appellate matters arguably are the most challenging to mediate given that by the time they reach the Supreme Court's Appellate Mediation Program, a trial justice has already declared one of the parties the victor. Nevertheless, over the past decade, the program on average has resulted in the resolution of 41 percent of the cases mediated. See Rhode Island Judiciary Annual Reports.

This has helped reduce the size of the court's docket and, correspondingly, has resulted in a speedier disposition of matters that are ineligible for mediation or that did not resolve through mediation.

5) The raise-or-waive rule

By far the most frequently invoked rule of appellate practice, the Rhode Island Supreme Court's unwavering adherence to the raise-or-waive rule over the past decade has made us better trial lawyers.

As dreaded as the court's sua sponte invocation of the rule may be, Rhode Island trial lawyers are acutely aware of its import. The rule is addressed in dozens of decisions each court term, and the Supreme Court's cautionary language accompanying every application of the rule has made trial lawyers more vigilant about error preservation.

Some of the decisions in which the court addressed the raise-or-waive rule in recent years include: Allegra Revocable Tr. – 2001 v. Deutsche Bank Nat'l Tr. Co., 225 A.3d 244 (R.I. 2020); Toohey v. DeMello, 228 A.3d 69 (R.I. 2020); Rosa v. Vericrest Fin., 219 A.3d 323 (R.I. 2019); Heneault v. Lantini, 213 A.3d 410 (R.I. 2019); Boudreau v. Automatic Temperature Controls, Inc., 212 A.3d 594 (R.I. 2019); Richard v. Robinson, 209 A.3d 1198 (R.I. 2019); Adams v. Santander Bank, N.A., 183 A.3d 544 (R.I. 2018); Archetto v. Smith, 179 A.3d 144 (R.I. 2018); Costantino v. Ford Motor Company, 178 A.3d 310 (R.I. 2018); Dunn's Corners Fire District v. Westerly Ambulance Corps., 184 A.3d 230 (R.I. 2018); McKenna v. Guglietta, 185 A.3d 1248 (R.I. 2018); Prospect CharterCare, LLC v. Conklin, 185 A.3d 538 (R.I. 2018); Ucci v. Town of Coventry, 186 A.3d 1068 (R.I. 2018).

As we usher in a new year and welcome a new court, there undoubtedly will be new appellate lessons to learn, but in the meantime, may these aspects of appellate practice continue to please the court.

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40 Court Street, 5th Floor,

Boston, MA 02108

(617) 451-7300