CORE
Metadata, citation and similar papers at core.ac.uk
Provided by University of Michigan School of Law

University of Michigan Journal of Law Reform

Volume 16

1983

Appellate Caseload: Meeting the Challenge in Rhode Island

Joseph R. Weisberger
Supreme Court of Rhode Island

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Courts Commons, and the State and Local Government Law Commons

Recommended Citation

Joseph R. Weisberger, *Appellate Caseload: Meeting the Challenge in Rhode Island*, 16 U. MICH. J. L. REFORM 527 (1983).
Available at: https://repository.law.umich.edu/mjlr/vol16/iss3/7

This Symposium Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

APPELLATE CASELOAD: MEETING THE CHALLENGE IN RHODE ISLAND

Joseph R. Weisberger*

Two of the most challenging and frustrating problems facing appellate courts in America are increasingly congested dockets and the sluggish pace of litigation. In an effort to combat these problems, the Supreme Court of Rhode Island has recently initiated several procedural techniques for screening and settling criminal and civil cases on appeal. These techniques have proven highly effective and should provide other appellate courts at least a partial answer to the burgeoning appellate caseload.

I. Rhode Island's Appellate Backlog as Impetus for Change

At its inception under the state constitution in 1843, the Supreme Court of Rhode Island functioned as both a trial court and an appellate court.[1] In 1905 the court was made solely an appellate tribunal and its membership was set at five justices. The trial court duties were assigned to the superior court. Since 1905 the superior court has more than doubled in size. New tribunals have been created from which appeals are taken directly to the supreme court.[2] Some cases decided on administrative appeal by the district courts may be reviewed by the supreme court on a petition for certiorari.[3] Yet Rhode Island has no intermediate state court. Consequently, the crush of appellate litigation has fallen on the supreme court, though its membership after eighty years remains fixed at five.

Given these developments, it is hardly surprising that the workload of the court has significantly increased in recent years. For example, in the last decade the number of cases filed in the court approximately

* Associate Justice, Supreme Court of Rhode Island. A.B., 1942, Brown University; J.D., 1949, Harvard University.

1. The Supreme Court of Rhode Island can trace its lineage to colonial times when it was known as "The Superior Court of Judicature, Court of Assize and General Gaol Delivery." At that time and for more than a century thereafter, Rhode Island had a charter granted by King Charles II in 1663 as its basic governing document. This structure was replaced in 1843 by a constitution adopted by a state convention in East Greenwich in 1842.

2. These tribunals include the Family Court, consisting of eleven judges, and the Worker's Compensation Commission, consisting of five members.

3. There are 13 justices of the district courts.

doubled, from 325 in 1972 to 634 in 1981. During that same period, however, dispositions by opinion remained relatively static, increasing from 189 in 1972 to 205 in 1981. This represented an output of approximately forty-one opinions per judge in 1981, a workload that has been suggested by one commentator to be a maximum *quality* output per judge in an appellate court.[4] Thus, Rhode Island was faced with an ever-mounting caseload, a limited judicial work force, and the realization that the opinion output of each judge could not be significantly increased without reducing the quality of the work product.

Moreover, the complexity of opinions was also increasing with the multiplication of decision points involved in each case. For example, appeals in criminal cases have not only increased significantly in absolute numbers since 1972, but they also involve an almost geometrical increase in constitutional issues rarely encountered prior to 1960. Each term of the Supreme Court of the United States has created new procedural safeguards for criminal defendants. Complexities relating to search and seizure, right to counsel, in-custody interrogation, eyewitness identification, right to confrontation, and speedy trial (to mention only a few) cause each opinion in a criminal case to involve many more issues and considerably more hours of work to complete than was necessary even a decade ago.

It became obvious to the members of the Supreme Court of Rhode Island that merely increasing the number of opinions would not achieve the desired result of bringing case dispositions into balance with case filings. Therefore, new procedures and devices had to be established to increase the number of dispositions without formal written opinion or full briefing and argument.

An examination of cases on the calendar, including those presented for final argument, disclosed that many cases both civil and criminal involved issues of settled law, issues of fact where the scope of review was extremely narrow, or legal contentions that could readily be perceived to be without merit. In some cases it was equally obvious that the court below had committed an error of law that could be detected summarily without the full briefing and argument processes. Consequently, the court developed techniques and procedures for rapidly bringing to the surface cases susceptible of summary determination without the application of the full panoply of the appellate processes. The court proceeded to establish a means in both criminal and civil cases to place such appeals on faster tracks suitable for the disposition of the issues presented.

At the same time, the court accepted full responsibility for manage-

4. *See* R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 9 (1976).

ment of cases upon the filing of the notice of appeal.[5] This rule change set the stage for eliminating a significant segment of appellate delay that occurs between filing a notice of appeal in the trial court and docketing the appeal with the accompanying transcript and record in the appellate court.[6] The Supreme Court of Rhode Island, having set the stage, began to implement fast-track procedures in earnest.

II. EXPEDITED HANDLING OF CRIMINAL APPEALS: PROVISIONAL ORDER 16

Provisional Order 16[7] was designed by the court to provide a flexible and efficient method of dealing with criminal appeals. The aim was to examine criminal appeals at an early stage in the proceedings and determine at that point whether a full appellate process was necessary and appropriate. The examination involves the following steps:

(1) Within twenty (20) days after the filing of the case record with the Clerk of the Supreme Court, the appellant is required to file a statement of the case and a brief summary of the issues proposed to be argued on appeal. This document is required to be concise, not to exceed five (5) pages.

(2) Within fifteen (15) days after the filing of the appellant's statement, the appellee or other responding party is permitted to file a counter statement.

(3) Upon the filing of the counter statement or the expiration of the time for filing, whichever is earlier, the clerk schedules a prebriefing conference. This conference is conducted by a single justice of the Supreme Court (chosen on a rotating basis) and attended by counsel for all parties. After hearing the oral comments of counsel and considering the written statements filed, the single justice will

---

5. The rules of appellate procedure were amended in 1979 to achieve this objective. *See* R.I. SUP. CT. R. 11(g):

> From the time of the filing of notice of appeal, the Supreme Court and trial courts shall have concurrent jurisdiction to supervise the course of said appeal and to promulgate orders of dismissal of appeal for failure to comply with these rules, either upon motion of a party or upon the court's own motion.
>
> From the time of the docketing of an appeal in the Supreme Court, said court shall have exclusive jurisdiction to supervise the further course of such appeal and enter such orders as may be appropriate, including orders of dismissal for failure to comply with these rules, either on motion of a party or on its own motion.

This new procedure is in accord with the ABA Standards for Appellate Courts. *See* STANDARDS RELATING TO APPELLATE COURTS §§ 3.50-3.51 (1977).

6. *See* J. MARTIN & E. PRESCOTT, APPELLATE COURT DELAY xv-xvi (1981).

7. R.I. SUP. CT. R. 12, PROVISIONAL ORDER NO. 16.

enter an order which may require further action as follows:
(a) That the case be fully briefed and argued.
(b) That a specific briefing schedule be adopted.
(c) That specific appeals be consolidated.
(d) That the case be remanded for specific action such as evidentiary hearings or entry by the trial court of necessary orders.
(e) That a show cause order be issued requiring either the appellant's attorney or the responding party's attorney to appear before the full court prior to briefing to show cause why the judgment or order appealed from should not be summarily affirmed or reversed without further briefing or argument.
(f) That when show cause orders are issued, counsel for either side be permitted, if desired, to amplify the prebriefing statements previously filed with an additional supplemental statement not to exceed ten (10) pages in length. The supplemental statements may include issues not set forth in the original statements so as to permit the argument of points first brought to light in the conference.

(4) Show cause arguments are heard by the full court and are normally limited to ten minutes on each side. After argument, the court may take any of the following actions:
(a) It may order that the case be fully briefed and argued.
(b) It may order that additional issues be argued on appeal.
(c) It may remand the case for specific actions such as evidentiary hearings or entry by the trial court of necessary orders.
(d) It may order that a case be assigned to a specific schedule for briefing or oral argument.
(e) It may order that cases be consolidated.
(f) It may order that the judgment or order appealed from be summarily affirmed or reversed with no further briefing or argument.
(g) It may order that the appeal be briefed and argued but only on specific issues and that other issues previously proposed to be briefed and argued not be pursued.[8]

Implementing these procedures enabled the supreme court to reduce

8. This synopsis is a paraphrase of the original at *id.* 9191(a)-(f).

significantly the backlog of criminal cases pending in the court in less than two years. Prebriefing conferences were held in 107 cases, and show cause orders were issued in sixty-eight cases. Of the forty-two show cause hearings held between September 1, 1981 and October 13, 1982, sixty-seven percent were disposed by summary order. Of those disposed by summary order, forty-three percent resulted in the appeal being dismissed and twenty-four percent resulted in reversal of the conviction.

The new procedures also cut back the workload on both defense and prosecution attorneys in cases where the court finds summary disposition appropriate. Heavily burdened appellate counsel for both the Attorney General and the Public Defender are no longer required to spend inordinate time briefing and arguing cases that do not merit such attention. Consequently, they have more time to prepare briefs and arguments in cases where the issues are appropriate for the full panoply of appellate responses. It should be emphasized that at every stage of these new procedures, the single justice and the full court exercise extreme care to insure that no case is assigned for summary disposition unless it involves issues of settled law, issues of fact where the trial justice cannot be found to be clearly wrong, or such clear error on the part of the trial court that summary reversal is appropriate.

Even with only one year of experience under these procedures, results have been so positive that the court, counsel on the staff of the Attorney General, the Public Defender, and the private defense bar have concluded that this is a helpful decision-making device for the court.[9] Attorneys interviewed from the private defense bar, however, were somewhat more negative than the institutional attorneys in their assessment of the merits of the fast-track procedures. Their criticisms included the time limitations which required attorneys to change their work habits and the fear that some issues might be overlooked in the fast-track process.[10] One must, of course, realize that any effort to shorten the period within which an attorney is required to respond is likely to meet with some degree of criticism. It is not unusual for members of the bar to resist change, particularly if that change is likely to disturb a condition of relative repose.

Most of the cases disposed of through show cause hearings are terminated by a brief order, often less than a page, which is dictated almost immediately after the hearing by the justice to whom the case is assigned. In some instances, where a statement of facts and a reference to a legal principle are deemed appropriate, a short per curiam opinion

9. *See* L. Olson & J. Chapper, Screening and Tracking Criminal Appeals: The Rhode Island Experience 16 (March 1983) (available from ABA Action Comm. to Reduce Court Costs).

10. *Id.* at 16-19.

will suffice. Seldom will such an opinion exceed two pages.[11] This pursuit of brevity illustrates the Rhode Island court's belief that no useful purpose is served in responding at length to issues adequately handled by an order or a brief per curiam opinion. Opinion writing should not be converted into "a massive art form" to be produced solely for its own sake.[12] The members of the Rhode Island Supreme Court are unanimously of the opinion that the safeguards of the conference before a single justice, the prebriefing statements and supplemental statements, and a hearing before the full court on a show cause argument are adequate guarantees to insure that no significant issue will be overlooked and that every case that merits full briefing and argument will receive the full formality of appellate treatment. The court has attempted to meet these same goals in the civil appeals process.

III. EXPEDITED HANDLING OF CIVIL APPEALS: RULES 16(g) AND 16(h)

To meet the burgeoning criminal appeals caseload, the Rhode Island court, not unlike courts in sister jurisdictions, gave precedence to criminal appeals over civil appeals. For approximately two years, though criminal appeals constituted less than thirty percent of total filings, sixty percent of the calendar time for regular argument was devoted to hearing criminal appeals. This had the inevitable effect of creating a massive backlog of civil appeals. This backlog demanded an immediate and vigorous response.

As with criminal appeals, many civil appeals involved questions of settled law or questions of fact with an extremely limited scope of review. For example, a decision by a trial justice to grant or deny a motion for new trial must be upheld unless the trial justice overlooks or misconceives material evidence or is clearly wrong.[13] Nevertheless, such decisions often spawn appeals where counsel will assiduously argue that the trial justice was clearly wrong when, in fact, the argument is over a factual matter that should have been made to the tribunal below. These arguments illustrate the attorney's disagreement with the trial justice, but in no way demonstrate that the trial justice was clearly wrong or overlooked or misconceived material evidence. To combat

---

11. Professor Leflar sensibly advocates that straightforward decisions be settled with straightforward opinions: "For a decision that simply follows established authority, it is necessary only to cite that authority and say that it is controlling; a lengthier statement serves no useful purpose. If no basis for appeal is found, there may be nothing to write about." R. LEFLAR, *supra* note 4, at 52.

12. *Id.* (quoting former Harvard Law School Dean Irwin Griswold).

13. *See, e.g.*, Handy v. Geary, 105 R.I. 419, 252 A.2d 435 (1969); Turenne v. Carl G. Olson, Co., 94 R.I. 177, 179 A.2d 323 (1962).

these abuses the Supreme Court of Rhode Island had implemented Rule 16(g), which permitted the responding party in an appeal to move to summarily affirm a decision of the tribunal below within ten days after receipt of the appellant's or other moving party's opening brief.[14]

In 1979 the court determined that it would add to the rule 16(g) procedures by introducing settlement conferences at the appellate level. These settlement conferences were conducted by a single justice of the supreme court and were designed wherever possible to bring about the disposition of cases without briefing or argument. The members of the court initially had hoped that these conferences might be conducted by a retired justice; however, no retired justice was available so the task was rotated among the active members of the court.

These conferences required a great deal of tact and forbearance on the part of the justice conducting the conference. Although the objective was promoting settlement, to avoid the possibility that the conference justice might be thought to have indicated a prejudgment or bias in the event that it was necessary for the case to be decided in the ordinary course, the conference justice had to avoid expressing opinions on any legal issues involved except in the most antiseptic and general sense.

Despite these handicaps, the program initially met with great success. During the first year of operation, approximately thirty-five percent of the cases submitted to settlement conference were resolved by agreement of the parties. At that time, however, the justice in charge of the program was selecting cases for their settlement potential. As a result of recommendations made by the National Center for State Courts, an experimental program was initiated to determine whether similar success could be achieved without preselection. Two groups of cases were selected at random: one group was submitted to settlement conference and the other, which acted as a control group, was allowed to proceed in the normal appellate course. During the year that this experiment was in force, twenty-six percent of the cases submitted to conference were settled or otherwise disposed; only four percent of the control group were resolved during the same period. This indicated rather forcefully that the judicial time involved in settlement conferences was worthwhile.

After the experimental period ended, cases were again preselected for their settlement potential. Certain types of cases, such as custody

---

14. The grounds for such motion were:

> (1) The issue on appeal is clearly controlled by settled Rhode Island law; (2) the issue on appeal is factual and clearly there is sufficient evidence to support the jury verdict, decision on the motion for new trial or the findings of fact below; or (3) the issue on appeal is one of judicial discretion and clearly there is no abuse of discretion below.

R.I. SUP. CT. R. 16(g). This rule had been in effect since 1974 but did not then provide for the issuance of a show cause order by the court, nor did it provide for a prebriefing conference.

disputes in domestic relations matters, cases involving alienation of affections, libel and slander, trespass to real estate, prescriptive rights of way, and other matters where the emotional impact of the case may exceed the parties' interest in monetary value, proved to be less fruitful in producing settlements. Consequently, such cases have generally not been included in the settlement mix.

It became apparent during the two years that settlement conferences were held that many cases in the appellate pipeline involved the type of issues enumerated in Rule 16(g), but no motions to affirm had been filed. In addition, some cases involved procedural defects, unobserved by either counsel, that made it necessary to remand the case to the trial court. Further, in some cases the tribunal below had committed an obvious error of law which required reversal or remand. No procedural device was available for handling this last group of cases without full briefing and argument and the ultimate writing of an opinion.

Consequently, in February 1982, the court adopted Rule 16(h), authorizing the court to require parties to file a short statement of their respective positions after the docketing of an appeal in a civil case.[15] The rule also provided for appearance before a single justice of the court for a settlement conference during which the issues on appeal might also be determined.[16] The rule further authorized the conference justice to issue an order to either party to show cause why the appeal should not be dismissed, the judgment below reversed or modified, or the matter remanded for further proceedings.[17]

Unlike the criminal show cause orders, hearings in the civil cases were allowed to be conducted before a hearing panel consisting of three justices.[18] The hearing panel had the power to issue an order dismissing the appeal, reversing or modifying the judgment, or remanding the case to the appropriate court for further proceedings.[19] The panel was also empowered in appropriate circumstances to place the case on the regular calendar for full hearing and argument.[20] Thus, except for the size of the panel that heard the show cause arguments, Rule 16(h) generally paralleled the provisions relating to the summary disposition of criminal cases.

Smaller hearing panels enabled the court to hear more cases on show cause argument without involving the entire court, thus increasing the capacity of the justices to deal with such cases. Presently, each justice devotes one week per month to civil settlement conferences and criminal

---

15. *See* R.I. SUP. CT. R. 16(h). The statement may not exceed 10 pages in length. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

conferences, and show cause argument hearings are held each month by a rotating panel of the court. Typically, a hearing panel will consider fifteen civil cases on a day selected for show cause hearings. During the past year, sixty-three percent of the cases placed upon the show cause calendar were disposed of by summary order or brief per curiam opinion. Thus, the summary and fast track procedures for civil cases appear to be at least as successful as those developed in the criminal area.

CONCLUSION

The Supreme Court of Rhode Island has recently undertaken some important procedural changes to deal with increased case filings and the resulting backlog. It has adopted techniques for screening and settling both criminal and civil cases by identifying and dealing with appeals that do not require or merit the full ceremonial response involved in the complete appellate process. The screening, identification, and summary disposition of such cases have given the court more time to respond to those cases demanding a clarification of the law, promulgation of new rules, or constitutional adjudication. We recognize that all appellate courts have a duty to guarantee just procedures and fair results in civil and criminal litigation, but articulating new legal principles and clarifying settled law are equally important, if more occasional, functions. Unnecessary proliferation of written opinions, especially lengthy opinions, should not be encouraged. Responding to frivolous issues raised on appeal, or spending scarce judicial time analyzing and responding to arguments foredoomed to but one conclusion, is an inappropriate allocation of judicial resources.

Consequently, we recommend the modest homeopathic summary procedures adopted by the Supreme Court of Rhode Island to any court of similar jurisdiction that finds it impossible to deal with an expanding caseload by the traditional response of increasing the output of judicial opinions.

In a previous article I suggested that the appellate structure of our judicial system resembles a great, full-rigged ship, some of whose seams have been opened below the waterline by the incessant pounding of the seas.[21] If the crew of appellate judges is to prevent the vessel from foundering, it is necessary that the pumping process be improved. A precarious balance between sailing and sinking is not the only objective. We no longer can afford the luxury of applying to every case brought before us the analysis typical of a writer of a law review article regardless of the merits of the questions raised.

21. Weisberger, *Appellate Courts: The Challenge of Inundation,* 31 AM. U.L. REV. 237, 237 (1982).