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# PUBLIC PROCESS AND OHIO SUPREME COURT RULEMAKING

JEFFREY A. PARNES\* AND CHRISTOPHER C. MANTHEY†

## I. INTRODUCTION

WHILE COURT-CREATED RULES, IN TERMS OF THEIR IMPACT ON SOCIETY, are often as important as judicial decisions or legislative acts, they are relatively unknown to the general public. Further, there is often no public input prior to their adoption. Rather, court rules are often promulgated with no opportunity for general public discussion. Judge Jack B. Weinstein recently called attention to such a lack of "public process" in federal court rulemaking<sup>1</sup> and expressed the hope that others will "speak out so that the matter can be thoroughly debated."<sup>2</sup> On the state level this factor is absent from most rulemaking promulgated by the Ohio Supreme Court, and this article will "speak out" on the need for injecting public process into the exercise of judicial rulemaking authority by that body.<sup>3</sup>

Several commentators have written about the role of public process in court rulemaking. They all agree on its desirability, regardless of whether court rules are subject to subsequent legislative alteration. However, with the exception of the comments of Judge Weinstein, who focused upon rulemaking in the federal courts, there has thus far been little discussion of what this public process should entail or how it should be implemented. This is particularly true with respect to state court rulemaking. As a result, there has been little, if any, recognition that the differing types of state court rulemaking mechanisms may call for differing types of public process.

It is particularly important to discuss public process in Ohio Supreme Court rulemaking since that court's rulemaking authority recently has been expanded. This article will trace the historical development of the high court's rulemaking authority and will demonstrate the lack of public process in present Ohio Supreme Court rulemaking. It will also discuss the reasons for this lack of public process and will suggest the ways of increasing public access to the court's various rulemaking mechanisms.

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<sup>1</sup> J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 87 (1977). See also Weinstein, *Reform of the Federal Rule-Making Process*, 63 A.B.A.J. 47 (1977); Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976). Professor Wright has convinced us to delete Judge Weinstein's recurring hyphen, Wright, Book Review, 9 ST. MARY'S L.J. 652, 658 n.3 (1978), although we do follow the judge's incorporation of both lawyer and non-lawyer elements of society into the term "public."

<sup>2</sup> J. WEINSTEIN, *supra* note 1, at 153.

<sup>3</sup> In so doing we will take a very broad view of what is encompassed within public process, perhaps a view not shared by Judge Weinstein. A discussion of the need for public process in lower court rulemaking is beyond the scope of this article.

## II. PERSPECTIVE ON THE OHIO SUPREME COURT'S RULEMAKING AUTHORITIES

In 1968, the voters of Ohio approved the so-called "Modern Courts Amendment," which effected the first major change since 1851 in article IV of the Ohio Constitution, the judicial article.<sup>4</sup> In part, this amendment expressly granted the Ohio Supreme Court new and extensive rulemaking authority. Section 5(A) of the new judicial article stated that the court "shall have general superintendence over all courts in the state" and authorized the adoption of rules "to provide for the temporary assignment of judges to sit and hold court in any court established by law." Section 5(B) said that the court "shall prescribe rules governing practice and procedure in all courts of the state," that it "may make rules to require uniform record keeping for all courts of the state," and that it "shall make rules governing the admission to the practice of law and discipline of persons so admitted." Section 5(C), after granting to high court judges the power "to pass upon the disqualification" of appellate or common pleas court judges, declared that "rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law." Section 4(A) provided that the supreme court prescribe "by rule" the duties and powers of presiding judges of the courts of common pleas. Furthermore, section 2(B)(1)(g) recognized the court's original jurisdiction in "admission to the practice of law, the discipline of persons so admitted, and all other matters related to the practice of law." Such a rule may well be an implicit grant of rulemaking authority.

Before 1968, the supreme court had little, if any, general power of superintendence over the judicial system in Ohio.<sup>5</sup> It did, however, possess some rulemaking authority over practice and procedure,<sup>6</sup> as well as significant rulemaking authority over the practice of law. Further, much of this pre-1968 judicial authority was based on statute.<sup>7</sup> Thus, the 1968 amendments constituted a significant alteration in the relationship which had previously existed between the court and the Ohio General Assembly.<sup>8</sup>

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<sup>4</sup> Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811 (1968).

<sup>5</sup> *Id.* at 821-22. *But see, e.g.*, OHIO REV. CODE ANN. § 1901.14(D) (Page 1968), mandating that municipal judges include in their yearly reports data required by the supreme court. This mandate apparently was first implemented at the time of the establishment of municipal courts. Act of May 24, 1951 § 1, 124 Ohio Laws 589, 601 (1951).

<sup>6</sup> Milligan & Pohlman, *supra* note 4, at 829.

<sup>7</sup> At least one commentator finds justification for the legislature's pre-1968 power to enact procedural laws in two constitutional provisions appearing in the Ohio Constitution since statehood. These provisions are said to constitute indirect grants of authority. One provision declared that "every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law," while a second stated that the legislative authority was vested in the Ohio General Assembly. Browne, *Civil Rule 1 and the Principle of Primacy — A Guide to the Resolution of Conflicts Between Statutes and the Civil Rules*, 5 OHIO N.U.L. REV. 363, 397-98 (1978) (citing OHIO CONST. art. VIII, § 7, art. I, § 7 (1802); OHIO CONST. art. I, § 18, art. II, § 1 (1851)). *See also* Krause v. State, 31 Ohio St. 2d 132, 143, 285 N.E.2d 736, 743, *appeal denied*, 409 U.S. 1052 (1972). Article XIV of the Ohio Constitution of 1851 has also been suggested as a source of judicial rulemaking authority. Cassidy v. Glossip, 12 Ohio St. 2d 17, 21-22, 231 N.E.2d 64, 67 (1967).

<sup>8</sup> *See generally* Browne, *supra* note 7, at 396-402. Although the high court has possessed explicit, constitutionally-based rulemaking authority since 1968, the extent to which the legislature continues to maintain any independent rulemaking authority appears to be an open question. *Id.* at 403-10. The proper legislative-judicial relationship in the context of further

The Ohio Supreme Court has possessed at least some rulemaking authority since the earliest days of statehood. On April 15, 1803, the First General Assembly passed "an act organizing the judicial courts" of Ohio, which implemented the judicial article of the first Ohio constitution.<sup>9</sup> At that time, the supreme court was granted the power to establish rules of practice for itself and for the courts of common pleas.<sup>10</sup> However, this authority over the general rules of practice for the common pleas courts was withdrawn the next year,<sup>11</sup> and the legislature thereafter enacted procedural statutes for both law and equity proceedings in the lower courts.<sup>12</sup> On February 16, 1810, the courts of common pleas were given general power to make their own rules of practice, as long as they were "as near as may be, conformable to the rules of the supreme court." The supreme court, however, was not given any enforcement power.<sup>13</sup> Three days later, an additional rulemaking provision was added which granted to the courts of common pleas the power to establish rules of practice for proceedings in chancery.<sup>14</sup> Such delegations of rulemaking powers apparently remained relatively unchanged until the adoption of the civil code in mid-century.<sup>15</sup>

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proposed changes which deal with constitutionally-recognized court rulemaking continues to be debated. See, e.g., 49 OHIO B. 1575 (1976); 50 OHIO B. 169 (1977); 50 OHIO B. 293 (1977).

It should be noted that Ohio's lower courts have traditionally possessed certain rulemaking authority. See, e.g., Act of Feb. 16, 1810 ch. LXXIV, § 40, 8 Ohio Laws 259, 274-75 (1809) (common pleas); Act of Feb. 25, 1852 § 6, 50 Ohio Laws 84, 85 (1852) (probate); Act of April 14, 1884 § 451(b), 81 Ohio Laws 168, 170 (1884) (circuit). For some lower courts, their powers and thus their relationships to the legislature were altered in 1968 as well. OHIO CONST. art. IV, § 5(B).

<sup>9</sup> Act of April 15, 1803 ch. XIV, 1 Ohio Laws 35 (1803) (Laws, etc.); OHIO CONST. art. III, § 1 (1802), *reprinted at* 1 Ohio Laws 10 (1803) (constitution).

<sup>10</sup> "[T]he supreme court shall have power . . . to make and establish all necessary rules for the orderly conducting [of] business in the said court . . . and to prescribe the forms of writs throughout the state, and to direct the general rules of practice for the courts of common pleas." Act of April 15, 1803 ch. XIV, § 5, 1 Ohio Laws 35, 37-38 (1803) (Laws etc.). The Ohio Constitution of 1802 provided that the state's judicial power be "vested in a supreme court, in courts of common pleas for each county, in justices of the peace, and in such other courts as the legislature may, from time to time, establish." OHIO CONST. art. III, § 1 (1802), *reprinted at* 1 Ohio Laws 10 (1803) (constitution) and OHIO REV. CODE ANN. app. at 336 (Page 1979).

<sup>11</sup> Act of Feb. 18, 1804 ch. XXV, § 16, 2 Ohio Laws 158, 165 (1804).

<sup>12</sup> Browne, *supra* note 7, at 397.

<sup>13</sup> "[I]t shall be lawful for either of said courts [the supreme court and the court of common pleas], from time to time, as occasion may require, to make rules and orders for their respective courts . . . to regulate the practice of the said courts respectively . . . and in order that the rules of practice and proceedings of the several courts of common pleas may be uniform, and as near as may be, conformable to the rules of the supreme court, the judges of the supreme court shall order the clerk of said court, to transmit copies of their rules and regulations, to the clerks of the courts of common pleas in every county, that the judges of the said courts may, from time to time, make rules and regulations agreeably thereto, as near as may be, for the practice of their courts respectively.

Act of Feb. 16, 1810 ch. LXXIV, § 40, 8 Ohio Laws 259, 274-75 (1809).

<sup>14</sup> "[I]t shall be lawful for either of the said courts [the supreme court or the court of common pleas], or courts of chancery . . . to make, alter, amend or revoke any rule of practice, . . . so that the same be not contrary to the provisions of this and any act of the legislature." Act of Feb. 19, 1810 ch. LII § 50, 8 Ohio Laws 178, 191 (1810).

<sup>15</sup> The rulemaking provision quoted at note 13 *supra* was retained during successive reorganizations of the judicial branch. Act of Feb. 23, 1816 ch. LXXVIII, § 72, Ohio Laws 310, 340 (1816); Act of Jan. 22, 1824 § 73, 22 Ohio Laws 50, 66 (1823); Act of March 8, 1831 § 76, 29 Ohio Laws 58, 72 (1831). The rulemaking provision, quoted at note 14 *supra* seemingly was repealed during the 1824 revision of the statute which directed the mode of proceeding in chancery. Act of

With the adoption of the Code of Civil Procedure in 1853,<sup>16</sup> the supreme court was granted sweeping power to prescribe rules for itself, the district courts and the courts of common pleas.<sup>17</sup> At about the same time, the supreme court was granted the power to make rules which regulated probate court proceedings.<sup>18</sup> While the civil code repealed most of the rulemaking statutes which were then in existence,<sup>19</sup> it did not affect the provision authorizing the supreme court justices to regulate practice before the supreme court.<sup>20</sup>

The year 1885 brought significant change. The provision which conferred

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Jan. 22, 1824, 22 Ohio Laws 75 (1823) (General). This provision was restored in a slightly different form in a further revision in 1831. Act of March 14, 1831 § 3, 29 Ohio Laws 81, 81 (1831) (General).

There were other miscellaneous rulemaking or quasi-rulemaking statutes enacted prior to the adoption of the civil code. For example, in the early days of statehood, the supreme court did not sit at Columbus but at various county seats of justice throughout the state. Act of April 15, 1803 ch. XIV, § 2, 1 Ohio Laws 35, 35-36 (1803). The court was then authorized to determine the times of holding court in the various counties. *Id.* As the volume of business grew, the court was authorized to divide the state into two districts, to sit in panels of two, and to decide which members of the court would sit in which districts. Act of Feb. 17, 1808 ch. XII, §§ 1, 2, 6 Ohio Laws 32, 32 (1808). When the judicial branch was reorganized in 1831, a "supreme court in bank" was created so that annual meetings of all judges of the supreme court were thereafter required. Act of March 10, 1831 § 1, 29 Ohio Laws 93, 93 (1831) (General). This supreme court en banc was then granted the power to prescribe its own rules of practice in a statutory provision. This statutory provision was independent of the provision which granted rulemaking authority to the supreme court. Compare *id.* § 9, at 93-94 with Act of March 8, 1831 § 76, 29 Ohio Laws 56, 72 (1831) (General). Finally, in 1845 the supreme court en banc was given the authority to establish rules to permit parties to voluntarily admit documents and laws into evidence. Act of March 12, 1845 § 6, 43 Ohio Laws 114, 115 (1844). This provision expressly stated that these rules were to be "binding and obligatory" in all courts of common pleas. *Id.* It constituted an important shift in legislative thinking about the supreme court's role in the Ohio judicial system. Apparently for the first time since 1803 the supreme court was given explicit rulemaking power over the common pleas courts.

<sup>16</sup> Code of Civil Procedure of the State of Ohio, 51 Ohio Laws 57 (1853).

<sup>17</sup> The judges of the supreme court shall . . . revise their general rules, and make such amendments thereto as may be necessary to carry into effect the provisions of this code; and they shall make such further rules consistent therewith, as they may deem proper. The rules so made shall apply to the supreme court, the district courts, and the courts of common pleas.

*Id.* § 601, at 160.

<sup>18</sup> The several probate judges shall, from time to time, make rules not inconsistent with the laws of this State, for regulating the practice and conducting the business in their respective courts . . . and the supreme court shall have power to alter and amend all such rules, and to make other and further rules, from time to time, for regulating the proceedings in all the probate courts of this State, as they shall judge necessary in order to introduce and maintain regularity and uniformity in the said proceedings.

The Act Defining the Jurisdiction and Regulating the Practice of Probate Courts § 14, 51 Ohio Laws 167, 171 (1853).

This power survives today: "The several judges of the probate court shall make rules regulating the practice and conducting the business of the court, which they shall submit to the supreme court. In order to maintain regularity and uniformity in the proceedings of all the probate courts, the supreme court may alter and amend such rules and make other rules." OHIO REV. CODE ANN. § 2101.04 (Page 1976).

<sup>19</sup> Code of Civil Procedure of the State of Ohio § 606, 51 Ohio Laws 57, 162-65 (1853).

<sup>20</sup> "The Supreme Court shall have power to prescribe such rules for the regulation of its practice . . . as may not be inconsistent with the laws of this State." Act of Feb. 19, 1852 § 6, 50 Ohio Laws 67, 68 (1852). Compare this rulemaking statute with its predecessor, Act of April 15, 1803 ch. XIV, § 5, 1 Ohio Laws 35, 37-38 (1803) (Laws, etc.). Although the civil code provided the supreme court with varying degrees of rulemaking authority, *see* notes 17, 18 *supra*, the court promulgated only one set of rules. By January, 1858, the supreme court pursuant to its newly acquired rulemaking power, *see* note 17 *supra*, adopted both "rules peculiar to the business of the Supreme Court," Ohio Sup. Ct. R. I, II, 5 Ohio St. at v (1858), and "rules other than those peculiar to the business of the supreme court." Ohio Sup. Ct. R. X, XI, 5 Ohio St. at ix (1858). These rules in large part covered the manner in which cases were to be litigated in the supreme court, together

upon the supreme court the rulemaking authority over the lower courts<sup>21</sup> was omitted.<sup>22</sup> Thus, once again the supreme court was without statutory rulemaking power over lower courts.<sup>23</sup>

In 1935 the balance shifted once again in favor of more judicial rulemaking authority.<sup>24</sup> A new provision directed the courts of common pleas and courts of appeals to make rules governing practice in their respective courts and to submit them to the supreme court for its approval. The supreme court was then empowered to amend these rules and to make its own rules, which would be binding in any of the courts of the state. Thus, the type of rulemaking power which the supreme court previously had possessed over the probate courts was extended to other lower courts, and the modern trend toward recognition of the increased supreme court rulemaking power began. The language of this 1935 provision was condensed somewhat in 1953 but remains a part of Ohio statutory law.<sup>25</sup>

with recordkeeping in the supreme court, district courts, and common pleas courts. *Id.* These rules remained relatively unchanged for some time, despite occasional amendments. *See, e.g.*, Ohio Sup. Ct. R. VIII, 9 Ohio St. at viii (1874); Ohio Sup. Ct. R. I, II, 15 Ohio St. at v (1866). In 1875, the first rule regarding "applications for admission to practice as attorneys and counselors at law" appeared. Ohio Sup. Ct. R. XXVI, 24 Ohio St. at v (1875).

<sup>21</sup> In 1880, when the laws of Ohio were finally codified into the revised statutes, Act of June 23, 1879, 76 Ohio Laws 192 (1879), the provision giving the court power to make its own rules became section 439, while the provision giving it rulemaking authority over many of the lower courts became section 446.

<sup>22</sup> Act of Feb. 7, 1885 § 439, 82 Ohio Laws 16, 18 (1885). This change coincided with a change in the lower court structure in Ohio. As amended on October 9, 1883, the judicial article of the 1851 constitution provided for circuit courts, and no longer provided for district courts; while both courts served essentially as intermediate appellate courts, the old district courts were composed of common pleas and supreme court justices, while circuit courts had their own judges. Compare the original provision, OHIO CONST. art. IV, § 5 (1802) with the current provision, OHIO CONST. art. IV, § 6.

<sup>23</sup> Supreme court rules, however, continued to have an impact on lower court procedure. For example, the judges of the circuit court were empowered to adopt uniform rules of practice for all the circuits, provided they were not in conflict with the rules of the supreme court. Act of Feb. 7, 1885 § 451, 82 Ohio Laws 16, 21 (1885).

Furthermore, notwithstanding the statutory change in 1885, the rules covering, *inter alia*, recordkeeping and continuances in circuit and common pleas courts were promulgated by the high court in early 1897. *See* the supreme court rules at 38 Ohio St. at xxxii (1883); 46 Ohio St. at v (1890); 55 Ohio St. at xix (1897). These rules continued well into the twentieth century. *See* the supreme court rules at 82 Ohio St. at lxxiv (1910); 127 Ohio St. at lxxxvii (1934); 157 Ohio St. at lxx (1952).

The supreme court also retained rulemaking authority over the probate courts. 1 ANN. REV. STAT. OF OHIO § 536 (Bates 6th ed. 1906). The supreme court appears to have seldom exercised this authority, however. Perhaps this was in large part due to the adoption by the majority of Ohio probate courts of the Uniform Rules of Probate Practice. E. H. POLLACK, OHIO COURT RULES ANNOTATED 59 (1949).

<sup>24</sup> The supreme court may make and publish rules with respect to the procedure in the supreme court not inconsistent with the laws of the state. The several judges of the courts of common pleas and the courts of appeals shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the supreme court. The supreme court may alter and amend such rules and make other and further rules, from time to time as is deemed necessary for regulating the proceedings in any of the courts of the state, for the purpose of making this act effective for the convenient administration of justice or of, otherwise, simplifying judicial procedure.

Act of April 14, 1935 §§ 12223-12247, 116 Ohio Laws 104, 114 (1935). The resulting rules of practice of the courts of appeal appear at 50 Ohio App. at xlix (1936).

<sup>25</sup> The supreme court may make and publish rules with respect to the procedure in the supreme court not inconsistent with the laws of the state.

The several judges of the courts of common pleas and the courts of appeals shall

In 1959 the legislature further extended the court's rulemaking power. It gave the supreme court the power to prescribe uniform rules of practice and procedure for traffic cases in courts inferior to the court of common pleas, provided that these rules were consistent with certain statutory provisions.<sup>26</sup> This was the last change in the court's procedural and supervisory rulemaking authority until the passage of the Modern Courts Amendment in 1968.

Because the foregoing statutory scheme has not been significantly altered since 1968,<sup>27</sup> there currently are at least five statutes which confer procedural and supervisory rulemaking authority on the supreme court. One statute, which deals with power over the probate courts,<sup>28</sup> can be traced back to 1853.<sup>29</sup> A second statute, which grants the court authority to prescribe its own rules,<sup>30</sup> can be traced in virtually its present form back to 1852<sup>31</sup> and in only a slightly different version back to 1810.<sup>32</sup> A third statute, which confers broad

make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the supreme court. The supreme court may alter and amend such rules and make other rules necessary for regulating the proceedings in any courts.

OHIO REV. CODE ANN. § 2505.45 (Page 1954).

It is interesting to note that when presented with appellate court rules pursuant to this provision, the Ohio Supreme Court took the view that Ohio courts of record had the inherent power to promulgate rules without preliminary high court approval. E. H. POLLACK, *supra* note 23, at 54. See also 8 OHIO B. 447 (1935) (letter from Chief Justice Weygant to Common Pleas Judge Gilmore, wherein the supreme court's position was based upon the lack of any constitutional provision). Today, appellate court rules need only be "filed" with the supreme court. OHIO R. APP. P. 31.

One small change was made in 1953 when the revised code was adopted. Since the beginning of statehood, it had been well established in the supreme court's rulemaking statute that court rules should be consistent with state laws. Thus it was clear that statutes took precedence over court rules, and the supreme court explicitly recognized this fact. However, in 1953 this language was dropped from the statutes which covered the supreme court's own rules. Compare Act of Feb. 19, 1852 § 6, 50 Ohio Laws 67, 68 (1852), quoted at note 20 *supra*, with OHIO REV. CODE ANN. § 2503.36 (Page 1954). This language also was dropped from the probate courts' rules. OHIO REV. CODE ANN. § 2101.04 (Page 1976). The implication was that the balance of power was now reversed and that court rules were now to have precedence over statutes. However, the provision regarding conformity to state law was retained in another key rulemaking statute, OHIO REV. CODE ANN. § 2505.45 (Page 1954), quoted at this note *supra*, so that the effect of the change was probably more illusory than real.

<sup>26</sup> One new provision said: "The supreme court of Ohio may . . . for the purpose of promoting prompt and efficient disposition of cases arising under the traffic laws . . . and related ordinances make uniform rules for practice and procedure in courts inferior to the court of common pleas. . . ." Act of July 21, 1959 § 2937.46, 128 Ohio Laws 97, 112 (1959). A second new provision said: "[T]he supreme court of Ohio may, by rule, provide for the uniform type and language to be used in any affidavit or complaint to be filed in any court inferior to the court of common pleas for violations of the motor vehicle and traffic acts and related ordinances. . . ." *Id.* § 2935.17, at 102. Pursuant to these provisions, the high court promulgated Rules of Practice and Procedure in Traffic cases for All Courts Inferior to Common Pleas (effective by at least January 1, 1969). Ohio Sup. Ct. R. 23, 12 Ohio St. 2d at xxii (1968). These rules for traffic cases may have been the first set of rules promulgated by the high court for governing courts which were neither constitutionally mandated nor state-funded.

<sup>27</sup> An act was recently passed recognizing supreme court authority in rulemaking over the court of claims, yet reference was simply made to the Modern Courts Amendment. OHIO REV. CODE ANN. § 2743.03(D) (Page 1954).

<sup>28</sup> OHIO REV. CODE ANN. § 2101.04 (Page 1976), quoted at note 18 *supra*.

<sup>29</sup> The Act Defining the Jurisdiction and Regulating of Practice of Probate Courts, 51 Ohio Laws 167 (1853).

<sup>30</sup> OHIO REV. CODE ANN. § 2503.36 (Page 1954).

<sup>31</sup> Act of Feb. 19, 1832, 50 Ohio Laws 67, 68 (1852), quoted at note 20 *supra*.

<sup>32</sup> Act of Feb. 16, 1810 ch. LXXIV, 8 Ohio Laws 259, 274 (1809), quoted at note 13 *supra*.

rulemaking power over the supreme court and some lower courts,<sup>33</sup> originated in 1935,<sup>34</sup> but this statute had a precursor in a portion of the first code of civil procedure which granted the court similar powers.<sup>35</sup> Finally, two statutes, which grant the court authority to make rules for traffic cases in the inferior courts, date back to 1959.<sup>36</sup>

Rulemaking statutes outside the procedural and supervisory domain have also survived the 1968 constitutional amendments. Two provisions of Ohio law now give the supreme court authority over the practice of law. One grants the court power to prescribe rules governing admission to the bar,<sup>37</sup> and the other gives it concurrent power, along with the courts of appeals and courts of common pleas, to discipline attorneys.<sup>38</sup>

These functions predate statehood. The government of the Northwest Territory consisted, in part, of territorial judges. In 1792, the territorial government passed a law requiring any attorney practicing law in the Northwest Territory to have his professional abilities examined by one or more of these judges.<sup>39</sup> By 1799 the territory had acquired a general assembly. In that year, the general assembly passed a new act regulating in considerable detail the practice of law.<sup>40</sup> This act required attorneys to have a license from the governor<sup>41</sup> which could only be obtained by passing an examination before two or more judges of the general court.<sup>42</sup> Furthermore, the applicant would not be admitted to the examination unless he produced a recommendation from a practicing attorney with whom he had studied for four years.<sup>43</sup> While examinations were to be conducted by at least two of the judges of the general court, these judges were authorized to appoint qualified examiners.<sup>44</sup> The act also placed various restrictions on the practice of law;

<sup>33</sup> OHIO REV. CODE ANN. § 2505.45 (Page 1954), *quoted at note 25 supra*.

<sup>34</sup> Act of April 14, 1935 §§ 12223-12247, 116 Ohio Laws 104 (1935), *quoted at note 24 supra*.

<sup>35</sup> See Act of Feb. 7, 1885 § 439, 82 Ohio Laws 16, 18 (1885); Code of Civil Procedure of the State of Ohio § 601, 51 Ohio Laws 57, 160 (1853).

<sup>36</sup> Act of July 21, 1959 § 2935.17, 128 Ohio Laws 97, 102 (1959); *id.* § 2937.46, at 112.

<sup>37</sup> No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned . . . , unless he has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.

OHIO REV. CODE ANN. § 4705.01 (Page 1977).

<sup>38</sup> The supreme court, court of appeals, or court of common pleas may suspend or remove an attorney at law from office or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude. . . .

*Id.* § 4705.02.

<sup>39</sup> [N]o person shall be admitted or practice as an attorney in any of the courts of this territory unless he is a person of good moral character and well affected to the government of the United States and of this territory and shall pass an examination of his professional abilities before one or more of the territorial judges and obtain from him or them before whom he may be examined a certificate of possessing the proper abilities and qualifications to render him useful in the office of an attorney.

2 Laws Passed in the Territory of the United States North-West of the River Ohio § 1, at 40 (1792).

<sup>40</sup> 1 Laws of the Territory of the United States North-West of the River Ohio 27-36 (1800).

<sup>41</sup> *Id.* § 1, at 27-28.

<sup>42</sup> *Id.* § 2, at 28.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* § 3, at 29.



these restrictions included the prohibition of judges, justices of the peace, court clerks, and sheriffs from practicing as attorneys in their home counties.<sup>45</sup> The 1799 act thus established joint legislative and judicial control over the practice of law, and this joint control has been characteristic of Ohio's legal system ever since.

The first state law on admission to the practice of law retained the main features of the territorial law; however, examinations were now to be conducted, or at least attended, by "any two judges of the Supreme Court."<sup>46</sup> The requirement of a license from the governor was eliminated.<sup>47</sup> Thereafter, the statutory scheme on examinations remained virtually unchanged throughout most of the nineteenth century.<sup>48</sup> When the revised statutes were adopted in 1880, the examination requirement became section 558, and a provision was added thereto which required the court to prescribe and publish rules governing it.<sup>49</sup> The language of this section has been carried over to today,<sup>50</sup> as have the territorial law restrictions on the practice of law by certain judicial and law enforcement officers.<sup>51</sup>

The 1799 act regulating the practice of law in the Northwest Territory gave the judges of the general court the power "at their discretion, to strike the name of any attorney from the roll [of licensed attorneys] for mal-conduct in his office."<sup>52</sup> The act provided that before such action could be taken, the attorney involved must have been served with a written complaint and given the chance to be heard in his own defense.<sup>53</sup> After statehood, the state supreme court could suspend attorneys from practicing in any court in the state.<sup>54</sup> In 1810, however, this power was narrowed so that the supreme court could suspend attorneys only from practicing before its own bench.<sup>55</sup> The

<sup>45</sup> *Id.* § 7, at 31.

<sup>46</sup> Act of Feb. 4, 1804 ch. XX, § 2, 2 Ohio Laws 124, 124 (1803-04).

<sup>47</sup> *Id.* § 1, at 124.

<sup>48</sup> *See, e.g.*, Act of Jan. 27, 1810 ch. XXVII, §§ 1-3, 8 Ohio Laws 83, 83-84 (1809); Act of Feb. 14, 1824 §§ 1-3, 22 Ohio Laws 374, 374 (1823) (General); Act of Feb. 14, 1824 §§ 1-3, 29 Ohio Laws 411, 411-12 (1831) (General). In 1875 the supreme court did adopt a short rule regarding applications for admission to practice, but it did not conflict with the statutory scheme. Ohio Sup. Ct. R. XXVI, 24 Ohio St. at v (1875).

<sup>49</sup> No person shall be permitted to practice as an attorney and counselor at law . . . , unless he has been previously admitted to the bar by order of the supreme court, or of two judges thereof; and the court shall fix times when examinations shall take place . . . , and shall prescribe and publish rules to govern such examinations. . . . 1 REV. STAT. OF OHIO § 558 (1879). A detailed court rule soon followed. Ohio Sup. Ct. R. XXVI, 38 Ohio St. at xxx (1883). It was the subject of much change until the time of the 1968 Modern Courts Amendment. *See, e.g.*, Ohio Sup. Ct. R. XV, 46 Ohio St. at xii (1890); Ohio Sup. Ct. R. XIV, 65 Ohio St. at xxx (1902); Ohio Sup. Ct. R. XVII, 176 Ohio St. at 1 (1964).

<sup>50</sup> OHIO REV. CODE ANN. § 4705.01 (Page 1977), *quoted at note 37 supra*.

<sup>51</sup> *See id.*; 1 Laws of the Territory of the United States North-West of the River Ohio § 7, at 31 (1800). *But see, e.g.*, Act of March 21, 1863, 60 Ohio Laws 21 (1863) (prohibiting deputy clerks from practicing as attorneys); Act of April 18, 1913, 103 Ohio Laws 468, 469 (1913) (prohibiting judges from acting as legal advisors, collectors, solicitors or attorneys for any bank, corporation, or loan or trust company).

<sup>52</sup> 1 Laws of the Territory of the United States North-West of the River Ohio § 5, at 30 (1800).

<sup>53</sup> *Id.*

<sup>54</sup> Act of Feb. 4, 1804 ch. XX, § 4, 2 Ohio Laws 124, 125-26 (1803-04).

<sup>55</sup> Act of Jan. 27, 1810 ch. XXVII, § 4, 8 Ohio Laws 83, 84 (1809). At this time, the court of common pleas was given the power to suspend attorneys from practice before the common pleas bench; yet any such suspension could be appealed to the high court. *Id.* § 4, at 84-85.

high court's authority remained narrowed until the 1880's<sup>56</sup> when it was again broadened such that the supreme court was authorized to remove or suspend any attorney from office. Such suspensions were effective in all courts of the state. Similar disciplinary powers were also granted to the common pleas and intermediate appellate courts.<sup>57</sup> Except for a 1925 change allowing these courts to give an attorney a "public or private reprimand,"<sup>58</sup> as compared to a suspension or removal, the courts' statutory disciplinary powers remain unchanged.<sup>59</sup> A special form of disciplinary power has been added recently. Since 1964, the supreme court has had the statutory power, exercised through a commission of judges which it appoints, to discipline judges through suspension or removal, as well as to force retirement due to disability.<sup>60</sup> The court was expressly granted the power to promulgate rules under which the commission would hear and determine disciplinary and retirement petitions.<sup>61</sup> About a year later, a basis for the removal or suspension of a judge was articulated as a "violation of such of the canons of judicial ethics as adopted by the supreme court as would result in a substantial loss of public respect for the office."<sup>62</sup>

Besides the foregoing statutory provisions on rulemaking, the pre-1968

<sup>56</sup> Act of Feb. 14, 1824 § 4, 22 Ohio Laws 374, 374-75 (1823) (General); Act of Feb. 14, 1824 § 4, 29 Ohio Laws 411, 412 (1831) (General).

<sup>57</sup> Act of Feb. 7, 1865 § 563, 82 Ohio Laws 16, 26 (1865). Review of lower court suspensions or removals, however, was available in the supreme court. *Id.* A later supreme court rule provided for the forwarding of lower court disbarment and suspension judgments to the high court. Ohio Sup. Ct. R. 37, 127 Ohio St. at lxxxviii (1934).

<sup>58</sup> Act of March 27, 1863 § 1, 111 Ohio Laws 411, 411-12 (1925).

<sup>59</sup> OHIO REV. CODE ANN. § 4705.02 (Page 1977). Shortly after the 1925 change, the high court adopted a rule concerning the rules of professional conduct. Ohio Sup. Ct. R. 28, 127 Ohio St. at lxxxviii (1934). Within this rule, the American Bar Association Canons of Ethics were commended, and statutory provisions on duties and obligations of attorneys were not superseded. This rule also provided that the wilful breach of any of the professional conduct rules by one admitted to practice law in Ohio would be punished by reprimand, suspension, or disbarment by any court of competent jurisdiction. *Id.* This rule on professional conduct rules was in force for quite some time. *See, e.g.*, Ohio Sup. Ct. R. 28, 157 Ohio St. at lxxii (1952). Prior to 1957, this rule was chiefly enforced by the eighty-eight common pleas courts, which were primarily responsible for discipline. Coen, *A Look at Lawyer Discipline in Ohio*, 7 CAP. U.L. REV. 245, 245-46 (1977).

Upon the recommendation of the Ohio State Bar Association Council of Delegates, 25 OHIO B. 689 (1952), the American Bar Association Canons of Professional Ethics were adopted in an Ohio Supreme Court rule in 1952. Ohio Sup. Ct. R. 28, 167 Ohio St. at lxxxiv (1958). The court's earlier rules of professional conduct were not eliminated. *Id.* By 1957, a breach of these canons, as well as the earlier rules of professional conduct, was made the subject of initial inquiry and determination by the newly created Board of Commissioners on Grievances and Discipline. Ohio Sup. Ct. R. 27, 167 Ohio St. at lxxvi (1958). No longer was punishment by any court of competent jurisdiction mentioned, so presumably initial enforcement was to be the sole responsibility of the new board. Ohio Sup. Ct. R. 28, 167 Ohio St. at lxxxiv (1958). The board continues to function today. *See* OHIO R. GOV'T BAR 5, 29 Ohio St. 2d at xxix (1972), amended as noted in 54 Ohio St. 2d at xxxiii (1978). The predecessor to the Rules for Government of the Bar of Ohio is Ohio Sup. Ct. R. 18, 176 Ohio St. at liii (1964). Today, the American Bar Association Code of Professional Responsibility governs, for there are no separate rules of professional conduct as in the past. Compare Ohio Sup. Ct. R. 19, 24 Ohio St. 2d at xviii (1971) with Ohio Sup. Ct. R. 19, 20 Ohio St. 2d at xlvi (1970). On present disciplinary procedures, *see also* Coen, this note *supra*.

<sup>60</sup> OHIO REV. CODE ANN. § 2701.11 (Page Supp. 1978).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* § 2701.12(A)(1). The high court had, in fact, adopted substantially all of the American Bar Association Canons of Judicial Ethics about ten years earlier, 160 Ohio St. at liv (1954), at the urging of the Ohio State Bar Association. *See* 25 OHIO B. 790 (1952). Shortly after doing so, the

judicial authority to promulgate rules was an inherent power possessed to some degree by all of Ohio's courts. In an often-quoted syllabus, the supreme court wrote: "Courts of general jurisdiction, whether named in the Constitution or established pursuant to the provisions thereof, possess all powers necessary to secure and safeguard the free and untrammled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of government."<sup>63</sup>

Of course, courts "established" pursuant to constitutional provisions are legislatively created; thus, the exercise of inherent power by constitutionally "established" courts can be legislatively nullified because their source of power is statutory.<sup>64</sup> Courts "named" in the constitution often have their jurisdiction constitutionally defined; thus, the exercise of inherent power by constitutionally "named" courts might only be nullified by constitutional amendment.<sup>65</sup> Because the Ohio Supreme Court had been named and granted certain jurisdiction in the Ohio constitutions of 1802 and 1851, many of the foregoing statutes on supreme court rulemaking would have been insignificant prior to 1968 if the court had recognized an absolute, or unfettered,<sup>66</sup> inherent power to promulgate rules. Although for some time the court had recognized that constitutionally named courts possessed some inherent rulemaking authority,<sup>67</sup> the court never recognized any inherent power to

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court adopted a rule which made any violation of these canons a form of misconduct subject to disciplinary action by the Board of Commissioners on Grievances and Discipline. Ohio Sup. Ct. R. 27(5), 167 Ohio St. at lxxviii (1958). Violation of these canons continues to be a cause for discipline. See OHIO R. GOV'T BAR 5(5), 29 Ohio St. 2d at xxxii (1972).

<sup>63</sup> Zangerle v. Court of Common Pleas, 141 Ohio St. 70, 70, 46 N.E.2d 865, 865 (1943). Such powers have been recognized since adoption of the Modern Courts Amendment. State ex rel. Foster v. Wittenberg, 16 Ohio St. 2d 89, 92, 242 N.E.2d 884, 886 (1968). Yet such powers could be exercised only when reasonably necessary. See, e.g., State v. Pfeiffer, 163 Ohio St. 149, 126 N.E.2d 57 (1955).

<sup>64</sup> OHIO CONST. art. III, § 1 (1802), quoted at note 10 *supra*; OHIO CONST. art. IV, § 1 (1851, amended 1968). See also current OHIO CONST. art. IV, § 1 (vesting judicial power in "a supreme court, courts of appeals, courts of common pleas . . . and such other courts inferior to the supreme court as may from time to time be established by law."). While statutorily-created courts may only have inherent, or implied, authority derived from statute, there is an indication that limits exist on the breadth of the legislature's power to override this judicial authority. In re Thomas, 67 Ohio L. Abs. 343, 348, 117 N.E.2d 740, 743 (P. Ct. Hamilton County 1954).

<sup>65</sup> The argument is particularly persuasive when the constitution is silent on rulemaking as was the Ohio Constitution until 1968. But see the discussion at note 7 *supra*.

<sup>66</sup> Parness, Correspondence, *Public Process and State-Court Rulemaking*, 88 YALE L.J. 1319 (1979). The authors use the term unfettered judicial rulemaking to mean court rules which cannot be legislatively altered. The term is also referred to as "true" rulemaking, Hall, *Judicial Rule-Making is Alive But Ailing*, 55 A.B.A.J. 637 (1969), or "full" or "complete" rulemaking, A.B.A. JUDICIAL ADMINISTRATION SECTION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 73 (5th ed. 1971) (handbook).

<sup>67</sup> In dictum in Schario v. State, 105 Ohio St. 535, 539-40, 138 N.E. 63, 64 (1922), the Ohio Supreme Court laid the foundation for the later establishment of unfettered, inherent rulemaking authority for the constitutionally defined court of appeals, as well as for itself. This foundation has since been cited with approval. United States v. Howard, 440 F. Supp. 1106, 1111 (D. Md. 1977); State ex rel. Smith v. Barnell, 109 Ohio St. 246, 251-52, 142 N.E. 611, 612 (1924); In re Appropriation by Director of Highways, 120 Ohio App. 273, 277, 201 N.E.2d 889, 893 (3d Dist. 1963). However, it has never been built upon. See the authorities cited in note 8 *supra*, note 68 *infra*. Notwithstanding a similar constitutional basis, lower courts may possess differing inherent powers *vis-à-vis* the legislature than does the high court. See Comment, *The Proposed Criminal Rules of Circuit Court Practice: A Selective Analysis*, 49 Miss. L.J. 617 (1978).

promulgate rules of procedure which were in conflict with statutes.<sup>68</sup> However, the court's unfettered rulemaking power had long been recognized in the area of admission and practice of law.<sup>69</sup> In fact, the supreme court recognized not only its own power in this area, but also that of the constitutionally created lower courts.<sup>70</sup> The court has said that the area is "exclusively" under judicial control.<sup>71</sup> It has declared that statutes in the area are "not strictly binding on the courts"<sup>72</sup> and that such statutes should be viewed as only "an aid to and not as a limitation on the power of the judicial branch."<sup>73</sup> Because of this recognized inherent judicial power over the practice of law, the remaining rulemaking statutes on admission to practice and on the discipline of those persons admitted<sup>74</sup> are of little significance.<sup>75</sup>

### III. RECENT EXERCISES OF THE OHIO SUPREME COURT'S RULEMAKING AUTHORITIES

As we have seen, the 1968 Modern Courts Amendment expressly granted the supreme court certain rulemaking authority. Since 1968 the court has exercised its new constitutional rulemaking authority, as well as its preexisting statutory rulemaking authority, by adopting ten different sets of rules.<sup>76</sup> An

<sup>68</sup> The high court in *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 22, 231 N.E.2d 64, 67 (1967), found it unnecessary to consider whether a procedural rule adopted under a common pleas court's inherent power would be valid in the face of a conflicting statute. *But see* *Cleveland Ry. v. Halliday*, 127 Ohio St. 278, 188 N.E. 1 (1933) (finding a common pleas court rule not authorized under the inherent rulemaking power solely because the rule conflicted with general law). *See generally The Rule-Making Power of Ohio Courts*, 7 OHIO B. 630 (1935) (noting the difference between those court rules which were invalidated because of a contrary legislative intent inferred from the legislative silence and those court rules which were invalidated because of contrary legislative enactments). *See also* *Meyer v. Brinsky*, 129 Ohio St. 371, 195 N.E. 702 (1935).

<sup>69</sup> *In re Nevius*, 174 Ohio St. 560, 565, 191 N.E.2d 166, 170 (1963); *Bar Ass'n v. Pleasant*, 167 Ohio St. 325, 335, 148 N.E.2d 493, 498-99 (1958); *In re McBride*, 164 Ohio St. 419, 422, 132 N.E.2d 113, 115 (1956); *In re Thatcher*, 80 Ohio St. 492, 652-56, 89 N.E. 39, 83-85 (1909).

<sup>70</sup> *Bar Ass'n v. Pleasant*, 167 Ohio St. 325, 335, 148 N.E.2d 493, 499 (1958).

<sup>71</sup> *In re Nevius*, 174 Ohio St. 560, 562, 191 N.E.2d 166, 169 (1963).

<sup>72</sup> *In re McBride*, 164 Ohio St. 419, 424, 132 N.E.2d 113, 116 (1956).

<sup>73</sup> *Bar Ass'n v. Pleasant*, 167 Ohio St. 325, 334, 148 N.E.2d 493, 499 (1958).

<sup>74</sup> OHIO REV. CODE ANN. §§ 4705.01-.02 (Page 1977), *quoted* at notes 37, 38 *supra*.

<sup>75</sup> The Ohio Supreme Court has stated that Ohio Revised Code section 4705.02 is of "no force and effect." *Smith v. Kates*, 46 Ohio St. 2d 263, 266, 348 N.E.2d 320, 322 (1976).

<sup>76</sup> The ten sets of rules, and their original places of publication, are: Rules of Court of Claims of Ohio, 42 Ohio St. 2d at xxv (1975); Rules of Superintendence for Municipal Courts and County Courts, 40 Ohio St. 2d at xxxvii (1975); Ohio Traffic Rules, 40 Ohio St. 2d at xvii (1975); Ohio Rules of Criminal Procedure, 34 Ohio St. 2d at xix (1973); Ohio Rules of Juvenile Procedure, 30 Ohio St. 2d at xix (1972); Rules of Superintendence, 29 Ohio St. 2d at xlv (1972); Rules for the Government of the Bar of Ohio, 29 Ohio St. 2d at xix (1972), *amended in* 54 Ohio St. 2d at xxxiii (1978); Rules of Appellate Procedure, 26 Ohio App. 2d at xvii (1971); Ohio Rules of Civil Procedure, 22 Ohio St. 2d at xvii (1970); Rules of Practice of the Supreme Court of Ohio, 20 Ohio St. 2d at xvii (1969). Further, and in addition to the Rules for the Government of the Bar of Ohio, the American Bar Association Code of Professional Responsibility and its Code of Judicial Conduct have been adopted. *See* notes 62, 65 *supra*. Some of these rules are comparable to the pre-1968 court rules, while others are not. At least one set, the traffic rules, apparently was not adopted under any authority granted by the Modern Courts Amendment but rather solely pursuant to statutory authority. OHIO REV. CODE ANN. § 2935.17 (Page Supp. 1978); OHIO REV. CODE ANN. § 2937.46 (Page 1975); OHIO TRAFFIC R. 1(B). Yet it would appear that if traffic rules are superintending rules, then the court rulemaking statutes pursuant to which the traffic rules were adopted may be superseded by OHIO CONST. art. IV, § 5(a). The rulemaking statutes which the court relied upon to promulgate rules for traffic cases may be superseded by OHIO CONST. art. IV, § 5(b) if municipal or mayor's courts which hear traffic cases are deemed to be courts of the state.

eleventh set, the Ohio Rules of Evidence, has been proposed but not accepted by the legislature.<sup>77</sup>

There appears to have been no standard mechanism which the high court used in its formulation and adoption of these rules. There were no permanent rules advisory committees. Rather, different *ad hoc* committees composed of lawyers and judges were sometimes appointed to draft proposals for various sets of rules or rule amendments. These committees were often aided by law professors who were likewise appointed on an individual project basis.<sup>78</sup> When certain rule changes were finally contemplated by the court, proposed changes were usually published in the Ohio State Bar Association Report with an invitation to interested persons to submit written comments.<sup>79</sup> Public hearings on proposed amendments were only occasionally held.<sup>80</sup>

### A. Civil Procedure Rulemaking

The first major rules project undertaken pursuant to the Modern Courts Amendment was the drafting of the Ohio Rules of Civil Procedure. Since many elements of the process used in formulating these rules have been utilized in initiating subsequent rule changes, the adoption of the civil rules should be examined in some detail.

The constitutional revision of the judicial article was approved by the voters in May, 1968. Within months the supreme court had begun to implement its rulemaking mandate by appointing a Rules Advisory Committee.<sup>81</sup> The committee separated into twelve subcommittees.<sup>82</sup> These subcommittees considered various blocks of rules, using the Federal Rules of Civil Procedure as a guide. It was felt that the federal rules were a desirable model because of the large numbers of cases interpreting and applying them.<sup>83</sup> Yet, because of the differences between the Ohio and the federal court systems, it was not practical to adopt the federal rules verbatim, and the committee modified many of them.<sup>84</sup> Beginning in mid-August, the full committee met at three week intervals to review the work of the

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<sup>77</sup> See 50 OHIO B. 231 (1977) on the first set of proposed evidence rules. See also Giannelli, *The Proposed Rules of Evidence: The General Assembly, Evidence and Rulemaking*, 29 CASE W. RES. U.L. REV. 16 (1978) on the status of the rules of evidence.

<sup>78</sup> Letter from Stanley E. Harper, Jr., Professor of Law, University of Cincinnati College of Law, to Jeffrey A. Parness (July 18, 1978) (on file with the authors).

<sup>79</sup> See, e.g., 44 OHIO B. 191 (1971) (soliciting comments and suggestions on proposed amendments to the Ohio Rules of Civil Procedure).

<sup>80</sup> Such hearings were held during the recent change of the Rules for the Government of the Bar of Ohio on attorney advertising. 50 OHIO B. 1250 (1977).

<sup>81</sup> Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO B. 727, 728 (1970). The committee, headed by Judge John V. Corrigan, was chosen in cooperation with the Ohio Judicial Conference. *Id.* Composed of thirty-eight lawyers and judges and a small staff, the committee began work during the summer of 1968. Harper, *Introduction to Ohio Rules of Civil Procedure: A Symposium*, 39 U. CIN. L. REV. 465, 468 (1970).

<sup>82</sup> Corrigan, *supra* note 81, at 728.

<sup>83</sup> *Id.* at 729. Further, the Ohio Supreme Court also suggested using the federal rules as a guide. *Id.* at 728; Harper, *supra* note 81, at 468-69.

<sup>84</sup> Harper, *supra* note 81, at 469. The committee's staff notes, which consist of only the views of certain committee staff members, compare the provisions of the new rules with the former Ohio statutes and the Federal Rules of Civil Procedure. OHIO REV. CODE ANN. *Civil Rules* at iii-iv (Page 1971) (Editor's Preface).

subcommittees.<sup>85</sup> The committee's complete draft of the civil rules was finished in December, 1968, and submitted to the supreme court late in that month.<sup>86</sup>

Article IV, section 5(B) contains a deadline of January 15 for submission of proposed procedural rules to the General Assembly. Because January 15, 1969, was less than a month from the time the committee's draft was completed, the court decided to postpone such submission for a year in order to allow adequate time for it to consider the rules and to allow public comment thereon.<sup>87</sup> Publication of the draft rules in *Ohio Bar*, together with a request for comments, began in November, 1968, and was completed by March, 1969.<sup>88</sup> At that time the court began a series of weekly, one-day conferences with the committee staff to review each rule individually.<sup>89</sup> At the same time, while members of the committee appeared before many bar association meetings to review and discuss the rules,<sup>90</sup> subcommittees performed further review of certain rules.<sup>91</sup> The court made various changes in the proposed rules. The modified rules, along with an invitation for further public comment and suggestions, appeared in *Ohio Bar* in installments beginning with the October 6, 1969 issue.<sup>92</sup> The court completed its review of the rules in November of that year and submitted the proposed rules to the clerks of both houses of the Ohio legislature prior to January 15, 1970.<sup>93</sup>

Even before submission of the rules to the legislature, a joint House and Senate select committee, consisting of three members from each branch, had been formed.<sup>94</sup> At the end of October the joint committee began informally reviewing the rules. It worked along with the Rules Advisory Committee staff, which acted as liaison between the legislature and the court.<sup>95</sup> The joint committee's meetings were open to the public, and comments from interested persons were invited.<sup>96</sup> Suggestions emanating from the select committee were relayed to members of the high court by the Rules Advisory Committee staff.<sup>97</sup> After submission of the court rules to the legislature, further suggestions of both the joint legislative committee and the Rules Advisory Committee were considered.<sup>98</sup> The court accepted some of the suggestions.<sup>99</sup> The rules of civil procedure were finally promulgated when the legislature

<sup>85</sup> Harper, *supra* note 81, at 469.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See 41 ОНЮ В. 1399-1412 (1968); 41 ОНЮ В. 1525-49 (1968); 42 ОНЮ В. 89-106 (1969); 42 ОНЮ В. 223-43 (1969); 42 ОНЮ В. 339-55 (1969).

<sup>89</sup> Harper, *supra* note 81, at 469-70.

<sup>90</sup> *Id.* at 470.

<sup>91</sup> Corrigan, *supra* note 81, at 729.

<sup>92</sup> See 42 ОНЮ В. 1201-17 (1969); 42 ОНЮ В. 1243-58 (1969); 42 ОНЮ В. 1415-43 (1969); 43 ОНЮ В. 21-51 (1970). Rules 38-86 thus appeared one day before submission to the legislature. Corrigan, *supra* note 81, at 729.

<sup>93</sup> Harper, *supra* note 81, at 470.

<sup>94</sup> 42 ОНЮ В. 1321 (1969).

<sup>95</sup> *Id.*; Corrigan, *supra* note 81, at 729.

<sup>96</sup> 42 ОНЮ В. 1321 (1969).

<sup>97</sup> Corrigan, *supra* note 81, at 729.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

failed to exercise its constitutional veto power,<sup>100</sup> becoming effective on July 1, 1970, about two years after the adoption of the Modern Courts Amendment.<sup>101</sup>

Since 1970 an abbreviated form of this rulemaking mechanism has been followed with respect to civil rule amendments. The court files proposed amendments with the clerk of each house of the General Assembly prior to January 15. At about the same time, the proposals may be published in *Ohio Bar*, and suggestions from the public are accepted until May 1.<sup>102</sup> If not vetoed by the legislature, proposed amendments become effective on July 1 and are then published in their final form in *Ohio Bar*, if not in the official reports.<sup>103</sup>

### B. Evidence Rulemaking

The Ohio Supreme Court used essentially the same process in drafting the Ohio Rules of Evidence as it used with the rules of civil procedure.<sup>104</sup> An Evidence Rules Advisory Committee and staff were appointed by the court in June, 1975.<sup>105</sup> Like the Civil Rules Advisory Committee, this committee was made up of members of the bench and bar, while the staff consisted primarily of law professors.<sup>106</sup> Again, the federal rules were used as a model.<sup>107</sup> In July, 1975, the same month that the federal evidence rules became effective, the committee began its work.<sup>108</sup> Four subcommittees were formed, each to handle a group of rules and each headed by a staff member who did the actual drafting of the proposed rules.<sup>109</sup> Subsequent publication of the proposed evidence rules, however, was not as extensive as that of the civil rules. Rather than publish rules in progressive installments, as had been done with the civil rules, the committee submitted the completed draft to the supreme court in March, 1976.<sup>110</sup> The court reviewed the rules, and only thereafter were the slightly modified rules widely published along with a request for comments.<sup>111</sup> The court held hearings on the proposed rules in November, 1976. The final draft was judicially approved on December 2, 1976, and the rules of evidence were formally submitted to the legislature on January 12, 1977.<sup>112</sup>

<sup>100</sup> OHIO CONST. art. IV, § 5(B) provides, in part, that “[s]uch rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval.”

<sup>101</sup> Harper, *supra* note 81, at 470.

<sup>102</sup> See, e.g., 44 OHIO B. 191 (1971).

<sup>103</sup> See 44 OHIO B. 891 (1971); 29 Ohio St. 2d at lix (1972).

<sup>104</sup> Between the drafting of the civil rules and the rules of evidence, various other sets of rules had been proposed and adopted. See the rules listed at note 76 *supra*.

<sup>105</sup> O’Neill, *Symposium: The Ohio Rules of Evidence*, 6 CAP. U.L. REV. 515 (1977).

<sup>106</sup> *Id.*

<sup>107</sup> Miller, *The Game Plan: Drafting the Ohio Rules of Evidence*, 6 CAP. U.L. REV. 549, 553 (1977). The late Chief Justice O’Neill advised the committee to use the federal rules as its foundation. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 552-53.

<sup>110</sup> Blackmore, *The Ohio Evidence Rules: 105 Years of Heritage and Dilemma*, 6 CAP. U.L. REV. 553, 540 (1977). Submission of the committee’s work product was accompanied by oral commentary by staff members. Miller, *supra* note 107, at 554.

<sup>111</sup> The rules were published in July, 1976. O’Neill, *supra* note 105, at 516; 49 OHIO B. 929 (1976).

<sup>112</sup> Blackmore, *supra* note 110, at 540.

The final version of the proposed rules was published in February, 1977.<sup>113</sup>

As was done with the civil procedure rules, the legislature formed a six-member joint subcommittee to study the evidence rules, composed of members of the judiciary committees of both houses.<sup>114</sup> The subcommittee's hearings were again public; participation, however, was minimal.<sup>115</sup> While the rulemaking mechanism for the rules of evidence had been quite similar to that for the rules of civil procedure, their fate was quite different. The joint subcommittee voted unanimously to reject the rules of evidence,<sup>116</sup> and the General Assembly followed its advice.<sup>117</sup> This rejection resulted partially from a feeling that there was not enough time for adequate consideration before the July 1 effective date prescribed by the constitution<sup>118</sup> and from the fact that there were no advisory committee notes, as there had been for the civil rules.<sup>119</sup> In 1978, the legislature again disapproved of the court's evidence rules.<sup>120</sup>

### C. Other Rulemaking

Normally, formulation of major rules packages begins with the drafting of rules by advisory committees; these rules and an invitation to comment are published in *Ohio Bar*.<sup>121</sup> The court, in preparing for minor rule changes, has often departed from this method. Further, there have been differences in the mechanisms used in drafting proposed rules. These differences are dependent upon whether they are authorized by section 5(A) or 5(B) of the constitution or by statute. Finally, there have been important variations between rules adopted pursuant to the same authority.

The most important difference between rules of superintendence under section 5(A)(1) and the rules of practice and procedure under section 5(B) is that the rules of practice and procedure must be submitted to, and approved by, the legislature.<sup>122</sup> Accordingly, the two sets of rules adopted under section 5(A)(1) — the Rules of Superintendence and the Rules of Superintendence for Municipal Courts and County Courts — were effective immediately upon

<sup>113</sup> 50 OHIO B. 231 (1977).

<sup>114</sup> Walinski & Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. U.L. REV. 344, 348 & n.21 (1978).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 348.

<sup>117</sup> *Id.* at 348-49. This action did not constitute the first legislative rejection of proposed rules; the criminal rules were vetoed several years earlier. 45 OHIO B. 1183 (1971); 45 OHIO B. 407 (1972); 46 OHIO B. 817 (1973). Criminal rules, however, did become effective in 1973. OHIO R. CRIM. P. 59, 34 OHIO ST. 2d at xciii (1973).

<sup>118</sup> Walinski & Abramoff, *supra* note 114, at 349.

<sup>119</sup> *Id.* at 350.

<sup>120</sup> Giannelli, *supra* note 77, at 18-20. The main reasons for the most recent disapproval include the following concerns: "(1) that the formulation of the rules of evidence is a legislative, rather than a judicial, function; (2) that the promulgation of rules of evidence does not come within the supreme court's authority to prescribe rules of practice and procedure . . . ; (3) that the need for rules of evidence had not been demonstrated; and (4) that certain rules . . . were undesirable." *Id.* at 20.

<sup>121</sup> Letter from Stanley E. Harper, *supra* note 78; Letter from David S. Hay, Staff Advisor on Procedural Rules, Ohio Supreme Court, to Jeffrey A. Parness (June 7, 1978) (on file with the authors).

<sup>122</sup> OHIO CONST. art. IV, § 5(B). However, section 5(B) does not require legislative approval of rules of admission and discipline.



adoption by the court.<sup>123</sup> Another difference between the sections is that sets of rules authorized by the practice and procedure part of section 5(B), including civil rules and evidence rules, have usually been drafted by *ad hoc* advisory committees, while the two sets of rules adopted pursuant to section 5(A) have been drafted by the court's administrative staff. For example, the comments to the municipal and county court rules were written by the court's staff rather than by the staff of an advisory committee.<sup>124</sup> Moreover, when proposed amendments to these lower court rules recently appeared, it was requested that comments be sent to the court's Administrative Director<sup>125</sup> rather than to an advisory committee.

In addition to using advisory committees and court staff, another variation finds the supreme court adopting, subject to possible revision, rules proposed by outside groups. Some of the rules of superintendence present examples; at least two rules were first proposed by the Ohio State Bar Association, while at least one other originated with the Ohio State Bar Association Foundation.<sup>126</sup> Another example is the Code of Professional Responsibility, adopted by the court at the urging of the Ohio State Bar Association after initial adoption by the American Bar Association.<sup>127</sup>

There have been significant differences in the notices and comments which the court has allowed before adopting the various rules; these differences

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<sup>123</sup> Rules of Superintendence Supreme Court of Ohio, 44 OHIO B. 1289 (1971) (applicable to courts of common pleas, SUPERINTENDENCE R. 1); Rules of Superintendence for Municipal Courts and County Courts, 48 OHIO B. 1 (1975).

<sup>124</sup> See 8 OHIO REV. CODE ANN. 5 (Baldwin 1971) (Preface to the Rules of Superintendence for Municipal Courts and County Courts).

<sup>125</sup> 51 OHIO B. 815 (1978). The Administrative Director is also designated recipient of comments on certain standards for lawyer discipline which the high court has recently requested. 52 OHIO B. 1056 (1979).

<sup>126</sup> 44 OHIO B. 1289, 1306-08 (1971). On the adoption of some of these proposals, see 49 OHIO B. 103 (1973); 46 OHIO B. 978 (1973).

<sup>127</sup> 43 OHIO B. 1083 (1970). A more recent, similar example concerns the rule on attorney advertising. Both bar associations acted quickly after the United States Supreme Court made its major pronouncement on attorney advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). While in Ohio the bar association's Committee on Legal Ethics and Professional Conduct had been studying the advertising issue for some time, after *Bates* the committee undertook a study of the decision in July, 1977, "for the purpose of making recommendations to the Ohio Supreme Court." 50 OHIO B. 851, 869 (1977). Around that time, the Ohio Supreme Court accepted the bar association's offer of assistance after *Bates*. 50 OHIO B. 870 (1977). Following the American Bar Association's formal adoption of one of two proposals on attorney advertising in August, 1977, 50 OHIO B. 1033-35 (1977), the Ohio State Bar Association recommended changes in the advertising rule to the Ohio Supreme Court. 50 OHIO B. 1209 (1977). On October 3, 1977, a notice of a supreme court public hearing on this proposed advertising rule appeared. 50 OHIO B. 1208 (1977). The notice included the October 24th date of the hearing, together with time and place; the notice also included the bar association's invitation to members to submit comments on the proposal to the president of the bar association. On October 10, 1977, this same notice appeared, but added thereto was a request that anyone wanting to speak on the proposal contact the supreme court clerk. 50 OHIO B. 1250 (1977). Nothing else on the proposal appeared in *Ohio Bar* until November 28, 1977, when the amendments to the court rules relating to attorney advertising appeared. 50 OHIO B. 1471 (1977). Some newspapers in Ohio ran stories on the hearing, and ten to twelve responses on the proposal were received by the clerk of court. See Letter from Thomas L. Startzman, Clerk of Ohio Supreme Court to Jeffrey A. Parness (July 6, 1978) (on file with authors). Apparently, one response was from a layman, "a representative of the Ohio Association of Broadcasters." *Id.* This example is a particularly apt illustration of the absence of public process in Ohio Supreme Court rulemaking when the need for public process seems quite compelling. A similar illustration regarding attorney specialization seems to be developing. See 52 OHIO B. 479 (1979).

appear somewhat unrelated to either the type of rule involved or the authority utilized. Thus, the rules of superintendence, adopted under section 5(A)(1), were not published in *Ohio Bar* for the first time until almost a month after they were effective, and no comments were invited preceding publication; the same practice has been followed for amendments to these rules.<sup>128</sup> Proposed new additional rules of superintendence have been published prior to adoption.<sup>129</sup> In contrast, the municipal and county court rules, also authorized by section 5(A)(1), were published, with a request for comments, fully one and a half years before their proposed effective date,<sup>130</sup> and amendments have likewise been published in advance.<sup>131</sup> Similar variations are found among section 5(B) practice and procedure rules. The original rules of civil<sup>132</sup> and criminal procedure<sup>133</sup> were published, with request for comment, well in advance of submission to the legislature. The rules of juvenile procedure were also published prior to submission, but by only three weeks.<sup>134</sup> The rules of appellate procedure were not published until after submission; yet within their publication there was an invitation to comment.<sup>135</sup> Proposed changes to all these rules are not always published prior to submission to the General Assembly, but even with post-submission publication, the court invites public comment and suggestions.<sup>136</sup> Finally, the traffic rules, which were promulgated pursuant to statute,<sup>137</sup> present yet another variation. They were first published well before their effective date, but without a request for comments.<sup>138</sup> Amendments to the traffic rules have been published as they become effective, with no advance notice.<sup>139</sup> It is thus apparent that there is no consistent supreme court policy regarding notice and comment during the adoption of rules.

The traffic rules are noteworthy not only because of their statutory basis, but also because they are the only rules which have a standing committee charged with their ongoing review. The supreme court created a Review

<sup>128</sup> 44 OHIO B. 1289 (1971); *see, e.g.*, 46 OHIO B. 103 (1973).

<sup>129</sup> *See* note 121 *supra*.

<sup>130</sup> 47 OHIO B. 685 (1973).

<sup>131</sup> 51 OHIO B. 815 (1978). Comments and suggestions on these more recent changes were to be sent to the Office of the Administrative Director. *Id.* Similar notes on the originally proposed rules were to be sent to the chief justice. 47 OHIO B. 685 (1973).

<sup>132</sup> 41 OHIO B. 1399 (1968).

<sup>133</sup> 44 OHIO B. 1183 (1971). Upon resubmission, however, there was no advance notice. *See* 45 OHIO B. 407 (1972); 46 OHIO B. 199 (1973); 46 OHIO B. 817 (1973).

<sup>134</sup> 44 OHIO B. 1589 (1971).

<sup>135</sup> 44 OHIO B. 281 (1971). After judicial submission of proposed rules to the legislative body prior to January 15, comments were to be sent to the court's advisory committee. *Id.* After such submission, and not later than 60 days prior to the rules' effective date, the high court is permitted to amend the rules already submitted. *Id.* Thus, proposed rules initially submitted by the high court may be amended, and often are, by the court during legislative deliberations on the proposed rules. *See, e.g.*, 46 OHIO B. 199 (1973); 46 OHIO B. 817 (1973) (proposed rules of criminal procedure); *see also* 48 OHIO B. 243 (1975); 48 OHIO B. 815 (1975) (proposed rules of court of claims).

<sup>136</sup> *See, e.g.*, 45 OHIO B. 301 (1972); 45 OHIO B. 307 (1972); 46 OHIO B. 167 (1973); 46 OHIO B. 918 (1973). Again, the court contemplated post-submission dialogue with the legislature. *See* note 137 *supra*.

<sup>137</sup> Ohio Traffic Rules, 40 Ohio St. 2d at xvii (1975).

<sup>138</sup> 47 OHIO B. 885 (1974).

<sup>139</sup> 47 OHIO B. 1499 (1974).

Commission, the function of which has been to meet at least once a year to consider "[a]ll comments and suggestions concerning the application, administration and amendment" of the traffic rules and to submit its recommendations to the supreme court.<sup>140</sup> The commission has between five and eleven members, all of whom serve for three-year terms and at least some of whom must be chosen from among the ranks of specified judicial and police officers.<sup>141</sup> The commission was established in 1967 when the original Ohio Rules of Practice and Procedure in Traffic Cases for all Courts Inferior to Common Pleas were adopted<sup>142</sup> and was hailed as a pioneering institution at that time.<sup>143</sup>

In practice, there appears to be no formal procedure for selecting the commission's membership. While interested persons are free to express their interest in serving on the commission, there is no formal application method.<sup>144</sup> In practice, the Review Commission works very closely with the court's Administrative Director.<sup>145</sup> The chairman of the commission is required to consult with the Administrative Director before holding meetings,<sup>146</sup> and the Assistant Administrative Director serves as secretary to the commission.<sup>147</sup> While all suggestions for changes in the rules must be submitted to the commission, the actual drafting of proposed rules is done by the Administrative Director's staff, which also writes the staff notes that accompany rules adopted by the court.<sup>148</sup> The commission's meetings are not closed, but neither are they publicized.<sup>149</sup> Thus, the Review Commission of the traffic rules functions more as a clearinghouse for outside proposals than as an originator and drafter of rules.<sup>150</sup> While the commission resembles the committees which drafted the various other sets of rules, it is somewhat unique in Ohio.

Four other bodies, all created by court rule, also have some resemblance to standing committees on rules; they are the Board of Bar Examiners, the Board of Commissioners on Character and Fitness, the Board of Commissioners on Grievances and Discipline, and the Board of Commissioners on the Unauthorized Practice of Law. All four boards have some rulemaking authority, which is subject to supreme court approval.

<sup>140</sup> OHIO TRAFFIC R. 22(A), 22(C).

<sup>141</sup> OHIO TRAFFIC R. 22(B).

<sup>142</sup> 40 OHIO B. 1502 (1967). The portion of the original rules which created the commission was traffic rule 22. The present numbering system and name "Traffic Rules" were adopted in 1975. OHIO TRAFFIC R. 22, 40 Ohio St. 2d at xvii (1975).

<sup>143</sup> France, *The Ohio Supreme Court's Traffic Court Rules: A Beginning of Procedural Rule-Making*, 1 AKRON L. REV. 1, 25 (1968).

<sup>144</sup> Telephone conversation between Jeffrey A. Parness and Coit H. Gilbert, Administrative Director, Ohio Supreme Court, on April 18, 1979, in response to a letter from Jeffrey A. Parness to Coit H. Gilbert (April 13, 1979) (on file with authors).

<sup>145</sup> The office of Administrative Director is created by the Ohio Constitution, which broadly defines the duties of that office. OHIO CONST. art. IV, § 5(A)(2) states: "The supreme court shall appoint an administrative director who shall . . . serve at the pleasure of the court."

<sup>146</sup> OHIO TRAFFIC R. 22(C).

<sup>147</sup> Conversation with Coit H. Gilbert, *supra* note 144.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> The original traffic rules were not drafted by the commission. Rather, the commission replaced the group which devised the first set of traffic rules. France, *supra* note 143, at 25.

The Board of Bar Examiners is charged with administration of the bar examination; it may "promulgate additional rules to aid in the conduct of the examinations."<sup>151</sup> The Board of Commissioners on Character and Fitness is responsible for handling applications for admission to the bar; it is authorized to promulgate standards of conduct for applicants for admission to the bar.<sup>152</sup> The Board of Commissioners on Grievances and Discipline has the duty and authority to adopt necessary rules and regulations for the disciplining of those already admitted to the bar.<sup>153</sup> Finally, complaints regarding the unauthorized practice of law are within the domain of the Board of Commissioners on the Unauthorized Practice of Law. This board has rulemaking authority similar to that of the Board of Commissioners on Grievances and Discipline.<sup>154</sup>

Like the Traffic Rules Review Commission, then, these boards are perhaps rulemakers, but they do not serve as traditional standing committees on rules. These boards are not concerned with rules *per se* but rather are administrative bodies, the rulemaking activities of which are limited to issuing regulations necessary to implement their tasks. Yet they are permanent bodies charged with the continuing oversight of various subjects contained in the Rules for the Government of the Bar. In some respects they are like rule committees.

#### IV. POSSIBLE EXTENSION OF THE OHIO SUPREME COURT'S RULEMAKING AUTHORITY

As noted earlier, a further possible source of constitutional rulemaking authority is Article IV, section 2(B)(1)(g), which gives the supreme court original jurisdiction in "all . . . matters relating to the practice of law."<sup>155</sup> Whether this provision actually is read to confer rulemaking authority is unclear, as is the scope of any such authority.

One case does suggest that at least some of the provisions in the Rules for the Government of the Bar were adopted as necessary to the implementation of the grant of jurisdiction in section 2(B)(1)(g). In *In re Spott*,<sup>156</sup> the supreme court rejected a law student's challenge to certain portions of the character questionnaire which accompanied his application for registration as a law student.<sup>157</sup> The court stated:

Under the provisions of Section 2(B)(1)(g) of Article IV of the Ohio Constitution, this court has original jurisdiction in the matter of

<sup>151</sup> OHIO R. GOV'T BAR I § 5.

<sup>152</sup> OHIO R. GOV'T BAR I § 9.

<sup>153</sup> OHIO R. GOV'T BAR V(37).

<sup>154</sup> OHIO R. GOV'T BAR VIII § 16. It is difficult to locate the rules or even the membership of any of these four bodies. In other states, similar bodies appear to be more accessible. For example, boards on continuing legal education, created pursuant to court rules, often have their regulations published in the state bar journal after supreme court adoption. Fulford, *Mandatory CLE Comes to Colorado: The New Rule 260*, 8 COLO. LAW. 619 (1979). The regulations proposed by these boards are sometimes subject to public hearings. In *re Regulations Governing CLE*, 52 WIS. B. BULL. 51 (1979).

<sup>155</sup> OHIO CONST. art. IV, § 2(B)(1)(g).

<sup>156</sup> 34 Ohio St. 2d 241, 298 N.E.2d 148 (1973).

<sup>157</sup> OHIO R. GOV'T BAR I § 2(A) states, in part: "Every person who intends to take the Ohio bar examination shall file . . . within 120 days after entering law school, an application for registration as a candidate for admission to the practice of law . . . . The application shall be accompanied by . . . a character questionnaire in duplicate prescribed and furnished by the Court."

admission of applicants to the practice of law in this state. To assist in assuring that only those applicants of high standards and moral character are admitted to practice, the court requires each applicant to complete the character questionnaire.<sup>158</sup>

On the other hand, the court in *Smith v. Kates*<sup>159</sup> suggested that the authority for the Rules for the Government of the Bar regarding disciplinary procedures, as opposed to admission procedures, comes from the portion in section 5(B) mandating that the supreme court prescribe rules governing practice and procedure in all courts of the state.<sup>160</sup> The court in *Smith* does mention as sources of authority section 2(B)(1)(g) and the inherent power cases which predated the Modern Courts Amendments.<sup>161</sup>

Thus, while case law is unclear on the source of authority for the promulgation of Rules for the Government of the Bar, the adoption of certain provisions within those rules indicates that the court may have relied on section 2(B)(1)(g).

Formerly, actions involving alleged acts of unauthorized practice of law by lay people were often brought pursuant to a statutory prohibition because it was felt that the high court had no disciplinary power over lay people.<sup>162</sup> There was a change with the advent of bar government rule VIII, adopted in 1976,<sup>163</sup> which established a comprehensive system for dealing with the unauthorized practice of law by lawyers and non-lawyers alike.<sup>164</sup> Because it has been held that bar government rule V supersedes the former statutory procedure for disciplining attorneys,<sup>165</sup> it is reasonable to conclude that bar government rule VIII is now the exclusive procedure for handling proceedings which involve the unauthorized practice of law. Bar government rule VIII does not seem to be a constitutionally permitted rule of superintendence under section 5 (A)(1); nor does it seem to fall within the portion of section 5(B) which authorizes "rules governing the admission to the practice of law and discipline of persons so admitted." Therefore, unless one

<sup>158</sup> 34 Ohio St. 2d at 243, 298 N.E.2d at 149.

<sup>159</sup> 46 Ohio St. 2d 263, 348 N.E.2d 320 (1976).

<sup>160</sup> *Id.* at 265-66, 348 N.E.2d at 322.

<sup>161</sup> *Id.*

<sup>162</sup> OHIO REV. CODE ANN. § 4705.01 (Page 1977) makes it unlawful for anyone to practice law "unless he has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules." In *Cuyahoga County Bar Ass'n v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 113, 369 N.E.2d 1232, 1237 (C.P. Cuyahoga County 1975), the court held that a local bar association could seek to enjoin activities involving "not only attorneys at law but corporations and laymen who are not amenable to the discipline of the Supreme Court of Ohio." However, actions were also brought pursuant to the inherent authority of courts to regulate the practice of law. *In re Practice of Law*, 175 Ohio St. 149, 151, 192 N.E.2d 54, 56 (1963), *cert denied*, 376 U.S. 970 (1964) (finding an inherent power to "regulate, control and define the practice of law" within the constitutional provision vesting the judicial power, in part, in the supreme court). See also *Green v. Huntington Nat'l Bank*, 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965). In *Bar Ass'n of Greater Cleveland v. Brunson*, 37 Ohio Misc. 61, 304 N.E.2d 250 (C.P. Cuyahoga County 1973), in which the court enjoined a lay person from the unlawful practice of law, the court referred to both the statutory prohibition and its own inherent power.

<sup>163</sup> OHIO R. GOV'T BAR VIII, 44 Ohio St. 2d at xxxiii (1976).

<sup>164</sup> OHIO R. GOV'T BAR VIII § 2(A) defines unauthorized practice as "the rendering of legal services for others by anyone not registered under Rule VII . . . ."

<sup>165</sup> *Smith v. Kates*, 46 Ohio St. 2d 263, 348 N.E.2d 320 (1976).

follows the suggestions in *Smith v. Kates*<sup>166</sup> that the bar government rules are section 5(B) rules of practice and procedure, the authority for a rule which purports to regulate laymen might only be justified under section 2(B)(1)(g), which gives the court original jurisdiction over "all other matters relating to the practice of law."<sup>167</sup>

Another area where the supreme court has exercised rulemaking authority over non-lawyers is, surprisingly, in its regulation of judges. The 'compliance clause' of the Code of Judicial Conduct states that all judicial officers, whether or not lawyers, should comply with at least some parts of the Code.<sup>168</sup> Because judges of mayor's courts in Ohio are not required to be admitted to the practice of law,<sup>169</sup> parts of the Code of Judicial Conduct also would seem to be based on the "all other matters" clause of section 2(B)(1)(g).<sup>170</sup>

Such a construction of this constitutional clause would not be unique. The Florida constitution contains a provision quite similar to Ohio's section 2(B)(1)(g). It states that "[t]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."<sup>171</sup> Even though this clause does not mention rulemaking, the Florida Supreme Court has used it as authority to adopt rules similar to Ohio's bar government rules, Code of Professional Responsibility, and Code of Judicial Conduct.<sup>172</sup>

## V. PUBLIC PROCESS AND THE OHIO SUPREME COURT'S RULEMAKING AUTHORITIES

The foregoing, brief review of Ohio Supreme Court rulemaking reveals that various mechanisms have been used. While some rule changes were initially drafted by diverse panels of experts, with input permitted from all sectors of the public prior to court adoption, others were formulated in relative obscurity by smaller groups. Legislative participation in the mechanisms also varies; the legislature plays a minor role, if any, in the mechanisms used for rules adopted under section 5(A), while it has power to amend, or even reject, some rules adopted under section 5(B). Presently, most proposed rule changes are published only in *Ohio Bar*. As a result of the

<sup>166</sup> *Id.*

<sup>167</sup> There is, of course, the argument that regulation of the unauthorized practice of law can be based on OHIO CONST. art. IV, § 1, which vests the judicial power in the high court. *In re Practice of Law*, 175 Ohio St. 149, 192 N.E.2d 54 (1963), *cert. denied*, 376 U.S. 970 (1964). This argument is unpersuasive, particularly in view of the rather extensive attention given elsewhere in the constitution to judicial rulemaking power. Yet, we recognize that this attention also undercuts our section 2(B)(1)(g) analysis.

<sup>168</sup> OHIO CODE OF JUDICIAL CONDUCT, 36 Ohio St. 2d at xxxiv (1973). *See also* OHIO TRAFFIC R. 16 (providing that certain portions of the judicial code shall apply to mayors who sit as judges).

<sup>169</sup> The statute authorizing mayor's courts does not contain any requirement that the judges of these courts be admitted to practice. OHIO REV. CODE ANN. § 1905.01 (Page Supp. 1978). *But see id.* §§ 1901.06, 1907.051 (specifically providing that judges of the municipal and county courts shall be admitted to the practice of law).

<sup>170</sup> Although some portions of the bar government rules, particularly rules V(5)(a) and VI(1)(c), also apply to non-lawyer judges, one supreme court judge opined that they do not. *State ex rel. Brockman v. Proctor*, 35 Ohio St. 2d 79, 91, 298 N.E.2d 532, 541 (1973) (Corrigan, J., dissenting).

<sup>171</sup> FLA. CONST. art. V, § 15.

<sup>172</sup> Letter from Hon. Arthur J. England, Jr., Chief Justice, Florida Supreme Court, to Jeffrey A. Parness (March 12, 1979) (on file with authors).

variations in the high court's rulemaking mechanisms and the lack of public familiarity with them, most Ohio rulemaking is inaccessible to the public. This lack of access, and the consequent absence of public process from judicial rulemaking, is regrettable.

It is instructive to examine public process in judicial rulemaking in other jurisdictions. Although such public process only recently has been the subject of substantial interest<sup>173</sup> to parties within<sup>174</sup> and without<sup>175</sup> government, there has been substantial agreement on the desirability of public process. Notwithstanding this general consensus, however, detailed inquiries into the appropriate elements of public process rulemaking, as well as the implementation of such public process, have not been widespread.<sup>176</sup> Consequently there have been few examinations of the differing forms of public process called for by the differing types of rules and rulemaking

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<sup>173</sup> Customary discussions about court rulemaking essentially center on the relative merits of unfettered versus fettered judicial rulemaking. J. WEINSTEIN, *supra* note 1, at 82-84. Compare draft of MODEL JUDICIARY ARTICLE § 15, J. AM. JUD. SOC'Y 132, 139 (1920) ("The Judicial Council . . . shall have exclusive power to make, alter, and amend all rules relating to pleading, practice and procedure. . . .") with draft of MODEL JUDICIARY ARTICLE § 607 and comment thereon, 26 J. AM. J. SOC'Y 51, 58 (1942) ("The judicial council . . . shall have power to make or alter the rules relating to pleading, practice and procedure. . . . The legislature may repeal, alter or supplement any rule or procedure. . . .") and text of the MODEL STATE JUDICIAL ARTICLE § 9, 47 J. AM. J. SOC'Y 8, 12 (1963) ("The Supreme Court shall have the power to prescribe rules governing . . . rules of practice and procedure. . . ."). Compare also Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) with Kaplan & Green, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 254 (1951) ("[I]t seems doubtful wisdom for a court to place itself beyond legislative control when it pronounces general rules."). These discussions about fettered versus unfettered judicial rulemaking continue today. Compare J. WEINSTEIN, *supra* note 1, at 77-87 with Parness, *supra* note 66, at 1319-21.

<sup>174</sup> See, e.g., J. WEINSTEIN, *supra* note 1, at 105-15; Carter, *Federal Civil Justice System*, 15 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 342, 345 (1979) (in which President Carter proposes to promote "more effective means of rulemaking" by requiring "each court of appeals to appoint an advisory committee composed of persons outside the court to make recommendations on the rules of practice and operating procedure within that court."); Joiner, *Rules and Rulemaking*, 79 F.R.D. 471, 477 (1978) (discussing "a great need to be more open in the process of rulemaking"); MacKenzie, *Dark Doings Among the Judges*, SATURDAY REV. May 28, 1977, at 19 (quoting former Senator Sam J. Ervin, Jr., as saying: "I believe that when judges act as policy makers, and lobbyists, it follows that their discussions should be public.").

<sup>175</sup> See, e.g., C. GRAU, *JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS, AND ACCOUNTABILITY* 49-66 (1978); Ashman, *Measuring the Judicial Rule-Making Power*, 59 JUDICATURE 215, 221 (1975); Hellman, *The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal, and Policy Questions*, 31 OKLA. L. REV. 509, 523 (1978); Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A.J. 579 (1975); Wheeler, *Broadening Participation in the Courts Through Rulemaking and Administration*, 62 JUDICATURE 281 (1979).

<sup>176</sup> The inquiries which have been made demonstrate a general consensus that permanent, published rulemaking procedures are needed and that these procedures should include provisions for the publication of proposed rules, comment periods, open hearings, establishment of permanent standing advisory committees, and opportunity for widespread input by all segments of the legal profession and by the public. C. GRAU, *supra* note 175, at 52; J. WEINSTEIN, *supra* note 1, at 147-53; Lesnick, *supra* note 175, at 579. Yet, these inquiries often do not detail the significance, if any, which the type of rule, or the traditional judicial-legislative relationship in the rulemaking area, should play in the implementation of these ideas. Further, the rulemaking mechanism of any one high court is often made to seem applicable to wide varieties of rules regardless of the nature of the rulemaking authority. See, e.g., C. GRAU, *supra* note 175, at 58, where, in a single table on state rulemaking procedures, the author lists Ohio as having prior publication, comment period, open hearings, and supreme court committees.

authorizations.<sup>177</sup> Such examinations are necessary if we seek to infuse more public process into Ohio judicial rulemaking.

### A. *The Need for Public Process*

Public process in judicial rulemaking seems necessary for several reasons. Most fundamentally, it is compelled by democracy and is consistent with our customary mechanisms of lawmaking.<sup>178</sup> There recently has been an increasing awareness that when courts make rules, they are performing a legislative rather than an adjudicative function and should, therefore, instill elements of public process similar to those employed by other legislative and quasi-legislative bodies.<sup>179</sup>

Judicial rulemaking not only addresses "strictly technical questions of procedure," but because it is a legislative proceeding, judicial rulemaking also has "a substantive effect on sensitive issues of social policy."<sup>180</sup> Frequently mentioned examples of such sensitive issues include class actions,<sup>181</sup> privileges,<sup>182</sup> and attorney advertising.<sup>183</sup> However, because sensitive issues are governed by court rule in many states, these issues often do not enjoy public process elements<sup>184</sup> similar to those elements which operate when the legislature considers socially significant acts.<sup>185</sup>

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<sup>177</sup> In large part, this lack of examination into public process for state court rulemaking may be due to the concentration of inquiries on federal court rulemaking. J. WEINSTEIN, *supra* note 1; Flanders, *In Praise of Local Rules*, 62 JUDICATURE 28 (1978); Lesnick, *supra* note 175. Federal court rulemaking is far less encompassing of diverse subject areas than is state court rulemaking. Compare 28 U.S.C. §§ 2071-2072, 2075-2076 (1976) with AMERICAN JUDICATURE SOCIETY, *USES OF THE JUDICIAL RULE-MAKING POWER* (1974) (research project).

<sup>178</sup> Professor Lesnick finds that the current federal rulemaking structure fails to meet "the expectations of our constitutional traditions." Lesnick, *supra* note 175, at 582.

<sup>179</sup> *Busik v. Levine*, 63 N.J. 351, 371, 307 A.2d 571, 578 (1973) (Weintraub, C.J.); *id.* at 381-82, 307 A.2d at 584 (Conford, J., dissenting); *id.* at 393, 307 A.2d at 589 (Mountain, J., dissenting); C. GRAU, *supra* note 175, at 49; Wheeler, *supra* note 175, at 285. Judge Weinstein notes: "When courts assume a legislative role, they should also assume the restraints that accompany that role. Public deliberations are a basic safeguard to insure a legislative process that is fair and informed." J. WEINSTEIN, *supra* note 1, at 87.

Professor Hazard finds that the United States Supreme Court "in some respects is certainly a legislative body." Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 1 (1978). Professor Hazard finds, however, that the Court's rulemaking process is "quite undemocratic" yet "capable of producing a very satisfactory product." Hazard, Book Review, *Undemocratic Legislation*, 87 YALE L.J. 1284, 1294 (1978) (book review of J. WEINSTEIN, *supra* note 1). In large part this finding seems to be based on the view that "the public, and indeed most of the bar, has very little that is worth saying with regard to the Rules." *Id.* at 1291. However, the reader should consider whether "increased legitimacy in the rulemaking process derives from public participation *per se* regardless of whether public contributions are likely to be politically viable." Parness, *supra* note 66, at 1324 n.32.

<sup>180</sup> Wright, *supra* note 1, at 656.

<sup>181</sup> See, e.g., *id.* at 654; Wheeler, *supra* note 175, at 284.

<sup>182</sup> See, e.g., Lesnick, *supra* note 175, at 580; Wright, *supra* note 1, at 654; Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177, 1190-91 (1978).

<sup>183</sup> See, e.g., Hellman, *supra* note 175, at 522; Parness, *supra* note 66, at 1322 n.27.

<sup>184</sup> This fact is true even when the courts employ advisory committees. See, e.g., Hellman, *supra* note 175, at 522 (describing as "highly secretive" the work of the Oklahoma high court and a special bar association committee on the advertising rule); Lesnick, *supra* note 175, at 580.

<sup>185</sup> In the Ohio General Assembly, for example, rules have been adopted which govern both House and Senate committee meetings and committee procedures. Such rules provide for prior notice, opportunity to be heard, and record-keeping. See, e.g., rules 31-39 of the Ohio House of



There are also sound practical reasons for increasing public access to rulemaking procedures. The final product is likely to be better if different viewpoints are considered. Just as legislative committees receive testimony from interested and knowledgeable persons on bills under consideration, courts too could benefit from the expertise and perspectives of others.<sup>186</sup> Possible effects of proposed action may be brought to the court's attention which otherwise might go unforeseen, permitting correction of deficiencies in proposed rules at an early stage. Even where public process does not lead to a different result it is a valuable tool in promoting public acceptance of judicial action. The knowledge that there exists an opportunity to be heard helps make the action more acceptable. Conversely, a wise rule may be criticized if it is promulgated with no opportunity for public input.<sup>187</sup>

### B. *The Achievement of Public Process*

Several characteristics of a public process rulemaking mechanism can be identified. These characteristics include a known rulemaking mechanism which provides sufficient notice and opportunity to be heard, attempts to insure a reasoned basis for decision, and remains open to public initiative.

Perhaps the most basic characteristic of public process in judicial rulemaking is that the rulemaking mechanism be known to the public.<sup>188</sup> Opportunity for participation will be meaningless if the public is unaware of

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Representatives, *reprinted in* HOUSE JOURNAL 53-54 (January 10, 1979). *See also* OHIO LEGISLATIVE SERV. COMM'N, A GUIDEBOOK FOR OHIO LEGISLATORS 50-55 (1977).

Benefits of public participation are also being recognized in the area of administrative rulemaking. A bill currently pending in Congress provides that "to ensure a full and balanced discussion of the desirability of proposed agency action and its alternatives, each agency should maximize the opportunity for timely and meaningful public comment in the decisionmaking process." Reform of Federal Regulation Act of 1979, S. 262, 96th Cong., 1st Sess. § 101(3) (1979).

<sup>186</sup> This statement assumes, of course, that others will have sufficient interest to convey their views, an assumption that we make though it may not be shared by others. Hazard, *supra* note 179, at 1291; Walinski & Abramoff, *supra* note 114, at 348 n.2; Wright, *supra* note 1, at 654.

<sup>187</sup> Public process in judicial rulemaking can be implemented in a manner which accommodates valid reasons against having such public process. Thus, emergencies which call for rule promulgation without the usual public process may be recognized, and costs and any inconvenience can be minimized by tailoring the public process to the type of rule being considered.

<sup>188</sup> This component is noted by most commentaries on public process in judicial rulemaking. *See, e.g.,* C. GRAU, *supra* note 175, at 52, *paraphrasing* J. WEINSTEIN, *supra* note 1; Lesnick, *supra* note 175, at 580; Wheeler, *supra* note 175, at 285. In a description of the United States Judicial Conference, the duties of which include the study and presentation of suggested changes in federal rules, Professor Lesnick said:

Nor has the conference itself seen fit to publish procedural rules or even an informal statement describing its procedures. What we know about the method by which rules are drafted and considered comes largely from speeches or articles by judges active in the work of the Judicial Conference. Were the Conference to state and publish its procedures, it not only would enhance the awareness of interested persons and thereby facilitate their participation, it would also find itself required to face explicitly the question whether its procedures now provide adequate means for obtaining a broad range of input.

Lesnick, *supra* note 175, at 285.

Notwithstanding agreement on the desirability of publicizing rulemaking mechanisms, one recent study found only five states presently have at least some published judicial rulemaking procedures. C. GRAU, *supra* note 175, at 57-58. Mechanisms for administrative agency rulemaking, on the other hand, seem more concretely established. *See, e.g.,* 5 U.S.C. §§ 553, 554 (1976); OHIO REV. CODE ANN. § 119.03 (A) (Page Supp. 1978). Yet, even these latter mechanisms may be affected by the calls for increased public process in governmental decision-making. Federal Regulation Act of 1979, S. 262, 96th Cong., 1st Sess. § 101 (3) (1979); *see* Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).

the rulemaking mechanism. Public awareness can best be achieved by the establishment of a definite rulemaking mechanism for each of the types of rules,<sup>189</sup> or perhaps for each of the forms of rulemaking authority.<sup>190</sup> Such an establishment could be accomplished most easily by court rule.

Recently, a few state high courts have promulgated rules on their rulemaking mechanisms;<sup>191</sup> in other states, explicit rulemaking mechanisms have been set out in statutes.<sup>192</sup> Typically, these mechanisms provide for ongoing review of rules by permanent bodies<sup>193</sup> consisting of representatives from the bench and bar<sup>194</sup> and sometimes non-lawyer members of the public.<sup>195</sup> In at least one state, one set of court rules was intended to provide the mechanism for the adoption of all possible court rules.<sup>196</sup> In other states the relevant court rule, or statute, provides only a mechanism for adopting particular types of rules,<sup>197</sup> and such a court rule, or statute, has been implemented even when final judicial rules are subject to further legislative review.<sup>198</sup>

<sup>189</sup> "Certainly, some rules merit less public participation than others. . . . [N]arrow, technical rules obviously have less claim to formal public deliberation than rules affecting 'sensitive issues of social policy.'" Parness, *supra* note 66, at 1322.

<sup>190</sup> Some state courts have unfettered rulemaking authority. Other state courts possess rulemaking authority subject to legislative veto as well as rulemaking authority which is concurrent with legislative rulemaking authority. *Id.* at 1323. "Arguably, a broad legislative role in rulemaking diminishes the need for judicial creation of other modes of public participation, particularly when state legislatures provide a reliable forum for open debate." *Id.*

<sup>191</sup> See, e.g., North Dakota's rule governing its own rulemaking, the Rule on Procedural Rules, Administrative Rules, and Administrative Orders (adopted March 15, 1978) [hereinafter cited as N.D. SUP. CT. R.]; North Dakota's rule governing local rulemaking, the Role on Local Court Procedural Rules and Administrative Rules (adopted March 15, 1978) [hereinafter cited as N.D. LOCAL CT. R.]; Nevada's rule on adoption of administrative rules, the Rules on the Administrative Docket (adopted June 7, 1978) (amended June 16, 1978) [hereinafter cited as NEV. R. AD. DOCKET]. See also Michigan's rules on high court and local rulemaking, MICH. GEN. CT. R. 926, 933. But see Proposed Michigan Rules, PROPOSED MICHIGAN COURT RULES SPECIAL PAMPHLET (West 1978), wherein rule 933 is omitted; Letter from Donald Ubell, Chief Commissioner, Michigan Supreme Court, to Jeffrey A. Parness (July 11, 1978) (on file with authors) (suggesting the omission was unintentional).

<sup>192</sup> See, e.g., OR. REV. STAT. §§ 1.730-.750 (1977) (creating a Council on Court Procedures, granting it procedural rulemaking power, and generally describing its operation). See also Miss. CODE ANN. §§ 9-3-61 to 9-3-73 (Supp. 1979) (granting the supreme court procedural rulemaking power, but creating an advisory committee to assist the court in its rulemaking responsibilities).

<sup>193</sup> In Oregon the reviewing body is the Council on Court Procedures, OR. REV. STAT. §§ 1.730-.750 (1977), while in Mississippi it is the Advisory Committee on Rules of Civil Practice and Procedure. Miss. CODE ANN. §§ 9-3-61 to 9-3-73 (1979). To assist the North Dakota Supreme Court, there are at least four standing advisory committees: Joint Procedure, Attorney Standards, Judiciary Standards, and Court Services Administration. N.D. SUP. CT. R. § 8.1. See also Md. R.P. 4(b) (creating a standing committee on procedural rules); MICH. GEN. CT. R. 933 (contemplating commentary on proposed rules by appropriate committees or sections of both the state bar and the judicial conference).

<sup>194</sup> See, e.g., Miss. CODE ANN. § 9-3-65 (Supp. 1979).

<sup>195</sup> See, e.g., OR. REV. STAT. § 1.730(1)(f) (1977) ("one public member, chosen by the Supreme Court"); N.J. STAT. ANN. § 2A:84A-34 (West 1976) ("members of the public").

<sup>196</sup> N.D. SUP. CT. R. § 2 (making the mechanism applicable to "procedural rules," including those on pleading and on regulation of the practice of law; "administrative rules," including those on the general operation of the judicial system; and "administrative orders," including those on the operation of a specific portion of the judicial system). See also Ralph Erickstad, Chief Justice of the North Dakota Supreme Court, A New Rule-Making Process for North Dakota, speech to the Judicial Rule-making Workshop, National Judicial College, in Reno, Nevada (May 22, 1978) (on file with authors).

<sup>197</sup> NEV. R. AD. DOCKET; Miss. CODE ANN. § 9-3-69 (Supp. 1979).

<sup>198</sup> Miss. CODE ANN. § 9-3-71 (Supp. 1979); Md. R. P. 4(b); Md. CONST. art. IV, § 18A.

Any established rulemaking mechanism should provide adequate notice of judicial rulemaking activities. Should public participation through commentary on proposed rules or rule changes be contemplated,<sup>199</sup> notice should be given well enough in advance to allow for effective response and should provide actual notice to those most likely to be interested in the rules under consideration. At times, it may be appropriate to provide not only general notice to the public at large, but also individualized notice to particular groups or persons. Depending on whom the notice is intended to reach, various means of notification may be called for.<sup>200</sup> Such notice, in order to be adequate, should contain enough information so that interested persons will be able to make informed judgments as to whether to present their views.<sup>201</sup>

States having established rulemaking mechanisms provide for varying times of notice. Typically, notice is required at least two weeks prior to the rulemaker's formal consideration of proposed rule changes.<sup>202</sup> Furthermore, they provide that recipients of notice are to include members of the bar,<sup>203</sup> the state bar association,<sup>204</sup> the legislature,<sup>205</sup> and the press.<sup>206</sup> Finally, states

<sup>199</sup> Some manner of participation, be it oral or written, should be standard. Yet, "emergencies may on occasion require the immediate promulgation of a rule without any public process." Parness, *supra* note 66, at 1322.

<sup>200</sup> United States Representative Holtzman recently made the following proposals which concern publication of contemplated federal rule changes: 1) that they be published in the Federal Register; 2) that they be submitted to private publishers of regularly issued materials published for the legal community; and 3) that they be furnished to organizations representing those segments of the legal community which are concerned with matters which may be affected by the changes, as well as to appropriate Congressional committees. H.R. 480, 481, 96th Cong., 1st Sess., 125 CONG. REC. 61 (1979).

For administrative agency rulemaking, in addition to the notice in the Federal Register, it has been suggested that agencies consider: factual press releases written in lay language, public service announcements on radio and television, direct mailings and advertisements where the affected public is located, and express invitations to groups which are likely to be interested in representing otherwise unrepresented interests and views. Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 305.71-.76(E) (1979) [hereinafter cited as Recommendations].

<sup>201</sup> United States Representative Holtzman suggests that notice of proposed federal rule changes include "a list of issues that the proposal raises and any copy of the proposal." H.R. 480, 481, 96th Cong., 1st Sess., 125 CONG. REC. 61 (1979). Advisory Committee Notes now usually accompany all notices.

Ohio law requires an administrative agency to give a reasonable public notice within at least 30 days prior to the hearing date, which is required to be set out in the notice; the notice must contain a synopsis of the proposal under consideration and a statement of its intended purpose. OHIO REV. CODE ANN. § 119.03(A) (Page 1978).

<sup>202</sup> Oregon law requires notice "at least two weeks before" consideration. OR. REV. STAT. § 1.730(3)(b)(1977). New Jersey law contemplates at least a nine month wait before the effectiveness of certain rules and requires public notice and opportunity for change in the interim. N.J. STAT. ANN. §§ 2A:84A-33 to 2A:84A-37 (West 1976) (relating to evidence rules). Maryland practice and procedure rules have a 30 day notice period, Md. R.P. 4(b), as do those of North Dakota, N.D. SUP. CT. R. 7.1. Similar Michigan rules have a "reasonable notice" requirement. MICH. GEN. CT. R. 933. This notice period is sometimes 30 days and sometimes 60 days. 58 MICH. ST. B.J. 285-86 (1979).

<sup>203</sup> In Michigan, proposed rules by a local court must be sent "to members of the bar in its judicial circuit." MICH. GEN. CT. R. 927.1(c). See also OR. REV. STAT. § 1.730 (3)(b) (1977).

<sup>204</sup> Notice of proposed changes in the General Court Rules of the Michigan Supreme Court must be sent to "the secretary of the State Bar of Michigan." MICH. GEN. CT. R. 933. See also N.D. SUP. CT. R. 7.1. In Michigan proposed changes are regularly published in the *Michigan State Bar Journal* (official publication of the unified or integrated bar), if not in newspapers of general circulation or legal newspapers. Letter from Sheldon L. Hochman, Assistant Executive Director

provide for varying forms of notice, including notice of the proposed rules changes,<sup>207</sup> notice of rules for which change is under consideration,<sup>208</sup> or occasionally more extensive information.<sup>209</sup>

Any established judicial rulemaking mechanism should provide for an opportunity for public input prior to a rule change. Who should be heard should vary according to the potential impact of the rule; at times it would seem best to allow comment by the public at large while at other times it seems desirable to allow only lawyers, judges, or other select groups to participate.<sup>210</sup> Opportunity for the public to be heard may take various forms: it may be limited to a hearing through written submissions or may include the right to be heard orally as well.<sup>211</sup> Further, opportunity for the public to give oral or written response to the presentations of others, or even to question the rulemaker itself, might be appropriate.<sup>212</sup>

As with notice requirements, states having established rulemaking mechanisms contemplate varying types of commentary on proposed rule changes. Such differences are evident from the variations in the expected recipients of the hearing notices.<sup>213</sup> Similarly, these states provide for differing

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For Program, State Bar of Michigan, to Jeffrey A. Parness (August 14, 1978) (on file with the authors).

<sup>205</sup> N.J. STAT. ANN. § 2A:84A-35 (West 1976).

<sup>206</sup> N.D. SUP. CT. R. 7.1.

<sup>207</sup> See, e.g., N.J. STAT. ANN. § 2A:84A-35 (West 1976); MICH. GEN. CT. R. 927.1(c), 933.

<sup>208</sup> OR. REV. STAT. § 1.730(3)(b) (1977) (requiring "description of the substance of the agenda of the hearing or meeting").

<sup>209</sup> Such information includes possible "grounds for" the proposed change and "supporting documentation." N.D. SUP. CT. R. 3, 4, 7. By restricting examples of public notice and other characteristics of public process rulemaking to instances where the rulemaking mechanism is known, i.e., has been established pursuant to statute or court rule, the authors do not mean to imply that the other characteristics are necessarily missing from any rulemaking mechanism which is not established or known. Rather, sufficient diverse examples of the other characteristics can be drawn from the known mechanisms. In regard to unknown rulemaking mechanisms, one study has found nine states, including Ohio, which possess all crucial elements of public process judicial rulemaking except for "published rulemaking procedures." C. GRAU, *supra* note 175, at 57. The authors believe that their disagreement regarding Ohio has been clearly, if not forcefully, shown.

<sup>210</sup> Parness, *supra* note 66, quoted at notes 189, 190 *supra*. In administrative agency rulemaking, such standards as "interested persons," 5 U.S.C. § 553(c) (1976), and "any person affected by the proposed action," OHIO REV. CODE ANN. § 119.03(c) (Page Supp. 1978), are used; a standard of persons "whose interests or views are relevant and not otherwise represented . . . whether or not they have a direct economic or personal interest," has recently been suggested. Recommendations, *supra* note 200, 1 C.F.R. § 305.71-6(A) (1979). At least one agency can now actually promote the utilization of the opportunity to be heard by providing, under certain circumstances, "for reasonable attorneys' fees, expert witness fees, and other costs of participating in a rulemaking proceeding." 15 U.S.C. § 2605(c)(4)(A) (1976).

<sup>211</sup> Ohio agency procedure includes both forms. OHIO REV. CODE ANN. § 119.03(c) (Page Supp. 1978). The opportunity to present oral testimony, in addition to written comments, has recently been expanded for several federal agencies. See, e.g., 15 U.S.C. § 57a(c)(1976) (Federal Trade Commission); *id.* § 2058(a)(2) (Consumer Products Safety Commission); *id.* § 78f(e)(4)(A) (Securities and Exchange Commission); *id.* § 2605(c) (Environmental Protection Agency).

<sup>212</sup> Ohio agency procedure allows for certain public examinations. OHIO REV. CODE ANN. § 119.03(c) (Page Supp. 1978). While the value of cross-examinations in an adversary context is well known, cross-examination can be quite time consuming. Therefore, recent statutes have permitted cross-examination in agency rulemaking but have also allowed agencies broad discretion to strictly limit it. See, e.g., 15 U.S.C. § 78f(e)(4)(A)(ii) (1976) (Securities and Exchange Commission); *id.* § 2605(c)(3)(B)(ii) (Environmental Protection Agency).

<sup>213</sup> See notes 206-09 *supra* and accompanying text.

types of commentary, including written and oral submissions as well as responses to the commentary of others.<sup>214</sup>

Any established judicial rulemaking mechanism should require a reasoned basis for decision. The rulemaker should make known the reasons for its decisions in order to facilitate public comprehension and later implementation of the rules.<sup>215</sup> In this manner more thoroughly considered rules are promoted.<sup>216</sup> In addition, it might be appropriate in certain circumstances for the rulemaker to be required to respond to the comments and testimony which have been submitted. The rulemaker should also keep records of its rulemaking proceedings.<sup>217</sup> The rulemaker should be free to reject all commentary but should be required to give reasons for so doing.

Presently, few established state rulemaking mechanisms require either a statement of reasons for action taken or the maintenance of a record on the pre-action proceedings. In North Dakota, however, the supreme court may adopt a rule change<sup>218</sup> only "after the hearing, completion of the record or filing of any briefs or comments, whichever is latest."<sup>219</sup> Allowance is made for a statement of reasons, but such a statement is optional.<sup>220</sup>

Finally, established judicial rulemaking mechanisms should provide not merely for responses to proposals initiated by the rulemaker but should provide a means by which anyone may petition for, or suggest, new rule changes. Allowing people to bring existing deficiencies to the attention of the rulemaker would make the rulemaking mechanism more democratic and more responsive to problems.

A few state rulemaking mechanisms now expressly permit petitions for rule changes.<sup>221</sup> They establish time periods within which the petitions must

<sup>214</sup> For example, pursuant to a rule which mandates that there be "manner and means by which the comments may be made," MICH. GEN. CT. R. 933, one court typically requests that comments thereon be sent to the court's clerk. 58 MICH. ST. B.J. 195 (1979). In a second state, the rulemaker is compelled to hold a "public hearing" in each of the congressional districts at least once every two years. OR. REV. STAT. § 1.740(2) (1977). Finally, the high court in a third state can only promulgate rules which regulate the practice of law after the rules receive a majority vote in an election in which a majority of the registered members of the state bar participate. See TEX. REV. CIV. STAT. ANN. art. 320a-1, § 4(a) (Vernon 1973), which was recently amended in other respects. *The New State Bar Act*, 42 TEX. B.J. 602, 603 (1979).

<sup>215</sup> See, e.g., J. WEINSTEIN, *supra* note 1, at 152; H.R. 480, 481, 96th Cong., 1st Sess., 125 CONG. REC. 61 (1979). Legislation is now pending which would require a statement of reasons for all "major rules" of federal agencies. Reform of Federal Regulation Act, S. 262, 96th Cong., 1st Sess., §§ 601-03. At least one federal agency must now issue "a statement of basis and purpose" as well as an "explanation of the reasons for any major changes" along with promulgated rules. Clean Air Amendments of 1977, 42 U.S.C. § 7607(d)(6)(A) (Supp. I 1977).

<sup>216</sup> See FED. R. CIV. P. 52 (a) ("In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . .").

<sup>217</sup> See authorities cited in note 215 *supra*. Although a transcript is not required for informal rulemaking under the federal Administrative Procedure Act, 5 U.S.C. § 553(c) (1976), at least one recent enactment requires that a transcript be made of any oral presentations before an agency. 42 U.S.C. § 7191(c)(3) (1976) (Department of Energy). The Ohio Administrative Procedure Act requires that the transcript be prepared at agency expense. OHIO REV. CODE ANN. § 119.03 (c) (Page Supp. 1978).

<sup>218</sup> Exception is made when the court determines an emergency exists. N.D. SUP. CT. R. 6.1.

<sup>219</sup> N.D. SUP. CT. R. 9.1. Local courts are under similar restrictions. N.D. LOCAL CT. R. 9.1.

<sup>220</sup> N.D. SUP. CT. R. 9.3 ("The action . . . may be accompanied by Official Comment, including a concise statement of its basis and purpose."). Local courts have a similar option. N.D. LOCAL CT. R. 9.3.

<sup>221</sup> See, e.g., NEV. R. AD. DOCKET § 3.2 ("Any judge, the Director of the Administrative Office of the Courts, or the Board of Governors of the State Bar of Nevada may file with the Clerk a petition

be acted upon;<sup>222</sup> yet, they do not mandate that the rulemakers must implement elements such as notice and opportunity for comment when the petitions are patently frivolous.<sup>223</sup>

### C. Public Process in Ohio Supreme Court Rulemaking

While Ohio Supreme Court rulemaking is regrettably inaccessible, minor changes would infuse it with the appropriate amount of public process. The high court's rulemaking mechanisms include elements of each of the aforescribed traits of public process. Perhaps the most important conclusion in regard to these present mechanisms is that, where public access is advisable, if not compelled by our democratic principles, these mechanisms lack consistency in their allowance of public access.

It is clear that Ohio's judicial rulemaking mechanisms remain relatively unknown to the public.<sup>224</sup> Knowledge of rulemaking mechanisms could, and should, be increased by the Ohio Supreme Court's promulgation of a set of rules,<sup>225</sup> or sets of rules,<sup>226</sup> on judicial rulemaking.<sup>227</sup> At least some mechanisms could be established through other means, such as legislative action.<sup>228</sup> However, one set of rules would be sufficient, as long as this set of rules would carefully distinguish between the various sources of the supreme court's rulemaking authority, the varying social impacts caused by differing rules, and the traditional role, if any, assumed by the legislature, the executive branch, the bar, and the general public. Such a set of rules would be similar to North Dakota's recent promulgation of its rule on rulemaking.<sup>229</sup> North Dakota's rule creates four standing committees;<sup>230</sup> Ohio's use of significantly more than four different advisory committees since 1968, together with its larger court system and more populated legal profession, seems to call for a

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to adopt amend or repeal an administrative rule."'). See also N.D. SUP. CT. R. 3.1, 4.1 (allowing "any person interested in a procedural rule, administrative rule or administrative order" to either file a petition or request a Standing Committee study).

<sup>222</sup> E.g., NEV. R. AD. DOCKET §§ 4, 5; N.D. SUP. CT. R. 3.3.

<sup>223</sup> E.g., NEV. R. AD. DOCKET § 4.3(a); N.D. SUP. CT. R. 3.5.

<sup>224</sup> These rulemaking mechanisms remain relatively unknown even to the authors notwithstanding an exhausting, if not exhaustive, search.

<sup>225</sup> See, e.g., N.D. SUP. CT. R. § 2, where only one set of rules seems to cover all areas of the court's rulemaking authority.

<sup>226</sup> In Oregon there is one set of provisions dealing with the mechanism for the adoption of civil rules of pleading, practice and procedure. OR. REV. STAT. §§ 1.730-.750 (1977). There is a second, distinct set which deals with the mechanism for the adoption of rules for the conduct of cases involving traffic offenses, boating offenses, and game and commercial fishing law violations. *Id.* §§ 1.510-.520. These two mechanisms provide for two different rulemakers, the Council on Court Procedures and the Oregon Supreme Court.

<sup>227</sup> The idea of increased formalization of the mechanisms used in Ohio Supreme Court rulemaking is not new. It has been said that Judge John V. Corrigan, Chairman of the Rules Advisory Committee which helped develop the present Ohio Rules of Civil Procedure, 43 OHIO B. 727 (1970), suggested in 1970 that there be a permanent, standing rules advisory committee of the Ohio Supreme Court; however, the court has continued to handle rules projects on an *ad hoc* basis. See Letter from Stanley E. Harper, *supra* note 78.

<sup>228</sup> See authorities cited in note 8 *supra*. Even if possible, establishment of such mechanisms by legislative action or by constitutional amendment would be unwise. See *In re Sunshine Law*, 400 Mich. 660, 255 N.W.2d 635 (1977); *Goldberg v. Eighth Judicial Dist. Ct.*, 93 Nev. 614, 572 P.2d 521 (1977) (each invalidating legislation opening judicial meetings on proposed rules to the public).

<sup>229</sup> N.D. SUP. CT. R.

<sup>230</sup> N.D. SUP. CT. R. § 8.1

greater number of standing committees. At a minimum there should be standing committees on rules of civil procedure, criminal procedure, appellate procedure, evidence, government of the bar, and superintendence.<sup>231</sup> The assignment of North Dakota's committees is "to provide continuing study and review of present rules and orders and to propose the adoption of new rules and the amendment or repeal of existing rules and orders for consideration by the Supreme Court."<sup>232</sup> Within such an assignment, there should be compulsory, periodic review of all rules as well as the responsibility of initially reviewing all correspondence which concerns suggested rule changes.<sup>233</sup>

The composition of any permanent standing committees which are established to assist the supreme court in exercising its rulemaking authorities should be defined by court rule. Such definitions should include individuals whose appointment to the committee is automatic,<sup>234</sup> individuals whose appointment is made because they belong to a group required to be represented on the committee,<sup>235</sup> and individuals whose appointment is totally discretionary.<sup>236</sup> However, totally discretionary appointments should be minimized. Either the full court, or the chief justice after consultation with the court,<sup>237</sup> should possess the appointment power. Together with the traditional assortment of judges and lawyers, many, if not all, of the advisory committees should have non-lawyer members. It often is possible that a lawyer's self-interest<sup>238</sup> is in conflict with the public interest.<sup>239</sup> Therefore, it is most important that members from outside the legal profession serve on committees with jurisdiction over those rules which affect sensitive issues of social policy.<sup>240</sup> Should public membership on certain committees be deemed

<sup>231</sup> This is not to imply, however, that there should necessarily be only six sets of actual rules promulgated by the high court, as compared to the present ten, exclusive of the evidence rules. See the rules cited at notes 76, 77 *supra*. Further, standing committees are needed even in areas where rules are subject to some legislative review. However, the composition of the committees may need to be varied accordingly. It is inappropriate to assume that potential legislative review will always result in actual legislative review and thus in extra-judicial public process. Parness, *supra* note 66, at 1323 n.31.

<sup>232</sup> N.D. SUP. CT. R. § 8.1.

<sup>233</sup> Such a responsibility is now held, for the Ohio traffic rules, by the Traffic Review Commission. Note 140 *supra* and accompanying text.

<sup>234</sup> This automatic appointment would be similar to the way in which supreme court rule now places the superintendent of the State Highway Patrol on the Review Commission of the Ohio Traffic Rules. OHIO TRAFFIC R. 22(B).

<sup>235</sup> Such appointments would be similar to the way in which the supreme court rule now places at least one common pleas judge on the Review Commission of the Ohio Traffic Rules. *Id.*

<sup>236</sup> By rule, the Review Commission of the Ohio Traffic Rules has between five and eleven members, but the origin of only five members is particularized. *Id.*

<sup>237</sup> The chief justice is probably best suited to finally decide on certain appointments to the committee on superintendence rules because he or she carries the constitutional duty to exercise "general superintending power over all courts in the state" in accordance with court rules, as well as the duty to assign temporarily judges of courts of common pleas and appeals. OHIO CONST. art IV, §§ 5(A)(1), 5(A)(3).

<sup>238</sup> For example, consider rules on the unauthorized practice of law, attorney advertising, and attorney discipline.

<sup>239</sup> "As long as the regulators are indistinguishable from those they regulate, it is impossible to tell when the public interest stops and the self-interest starts." Sims, *After Lawyer Advertising*, *What?*, 50 OKLA. B.J. 1367, 1371 (1979).

<sup>240</sup> See notes 181-86 *supra* and accompanying text.

inadvisable, as when committee work addresses "strictly technical questions of procedure,"<sup>241</sup> other forms of general public participation should be permitted, if not encouraged. Also, legislative and executive branch representation on certain committees seems compelled, at least where the committee functions in areas exclusively within the province of the court and thus not subject to legislative overview.<sup>242</sup>

The lack of consistency in the Ohio Supreme Court's utilization of its rulemaking authorities may appear most often in its handling of notice on its rulemaking activities.<sup>243</sup> The inadequate time for public response to the rules causes difficulties. To alleviate these difficulties and to establish expectations within those persons who regularly partake of the opportunity to participate in the rulemaking mechanisms, any high court rule on rulemaking should include specified times, which must follow notice and precede final committee and court consideration of rule changes. Emergency rulemaking should be excepted from this requirement. Further, such a rule should set out the contents of notice and the recipients thereof. Where available, committee notes should be published. Also, while publication in the Ohio State Bar Association Report should not be discontinued, the report should not continue to be the only official source of notice of many contemplated rule changes. Ohio's various lower courts, legal and non-legal newspapers and magazines, local bar associations, relevant legislative committees, law school libraries, and major non-law libraries should regularly receive notices of proposed rule changes.<sup>244</sup>

Notice of contemplated rules changes should contain information on the ways in which one's views on such changes could be heard by the body contemplating change. At the least these opportunities to be heard should vary according to the type of rule under consideration,<sup>245</sup> the type of change under consideration,<sup>246</sup> the stage which the rulemaking body has reached in its contemplation of change,<sup>247</sup> and the prospects of careful subsequent legislative review. Yet while the need for flexibility is apparent, the court rule on rulemaking should attempt to insure that opportunity to be heard cannot be easily eliminated for invalid or insufficient reasons. This objective could be

<sup>241</sup> See note 180 *supra* and accompanying text.

<sup>242</sup> Because subsequent inter-branch problems might be reduced, representation on committees which work with rules to be submitted to the legislature after court adoption also seems in order.

<sup>243</sup> See notes 130-41 *supra* and accompanying text.

<sup>244</sup> Consideration might also be given to the establishment of further, individual mailing lists by each of the committees.

<sup>245</sup> The reader should recall that Ohio Supreme Court rulemaking covers quite diverse subject areas. Thus, a rule which seeks solely to assist the Administrative Director in his or her recordkeeping duties might prompt only a call for written comments. However, a rule which seeks to eliminate alleged abuses in the use of pretrial procedures, including discovery, might prompt the calling for a public hearing. Oral testimony and perhaps cross-examination would be received at this hearing because such a rule would need to be based, in part, on factual findings regarding the nature and extent of any abuses. See, e.g., Lundquist & Schechter, *The New Relevancy: An End to Trial by Ordeal*, 64 A.B.A.J. 59 (1978) on recent consideration of such a possible change in the federal rules.

<sup>246</sup> For example, grammatical and other insignificant changes, the purpose of which is not to affect the substance of any rule, should spur only a call for written comments.

<sup>247</sup> The more preliminary the investigation, the more likely it would be that extensive oral hearings are unnecessary.



achieved by allowing opportunity to submit written comments, again excepting emergencies.

Reasoned bases of rule decisions can best be achieved in Ohio by the requirement that official comments, akin to the existing Staff Notes,<sup>248</sup> regularly accompany major rule changes<sup>249</sup> and by the requirement that records always be kept by the various advisory committees as well as by the court. It seems foolish to require an extended, official comment on each and every rule change; yet, perhaps notice on contemplated rules changes should be required to contain a general explanation of the rationale behind the changes under consideration.<sup>250</sup>

Finally, accessibility to each of the Ohio rulemaking mechanisms, however different they may be from each other, would be greatly enhanced by a standing invitation to anyone interested to address the relevant committee. Written comments which concern either the merits or deficiencies in any of the existing court rules should be accepted. Such invitations have apparently been extended in the past, but widespread knowledge thereof has been lacking. Future gaps are easily remedied by inclusion of the invitations in the rules on rulemaking. Initial review should be vested in a designated committee member, who should have the authority to eliminate frivolous communiqués from future consideration. Such a reviewer's power need not be feared since the records of action always would be subject to review. Further, channels of communication between the various committees should be established so that, *inter alia*, misdirected communiqués are eventually considered. Incidentally, such channels need also be open so that each committee is aware of the work, experiences, and future agenda of the others. Clear channels of communication can be assured by assigning at least one person, probably some member of the high court's staff, to sit on each of the advisory committees.

## V. CONCLUSION

By approving the Modern Courts Amendment in 1968, the voters in Ohio decided to vest in the Ohio Supreme Court new, and greatly expanded, rulemaking powers. Since that time, the high court has exercised these new as well as its pre-existing powers by adopting, proposing, or amending eleven different sets of rules. The high court has generally, and deservedly, received high commendation for doing so. However, in promulgating rules, the court has utilized quite diverse mechanisms which often exclude the public at large from participation in the judicial rulemaking process.

The relative absence of public process from the Ohio Supreme Court's rulemaking mechanisms is regrettable. This absence should be eliminated through the court's promulgation of a set of rules on the exercise of its rulemaking powers. The rulemaking mechanism should be sufficiently definite to command public awareness. Provisions for public notice and input

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<sup>248</sup> See, e.g., note 148 *supra* and accompanying text on staff notes accompanying the traffic rules. See also OHIO REV. CODE ANN. *Civil Rules* at iii-iv, xi (Page 1971) (Editors Preface) for an explanation of the staff notes to Ohio's rules of civil procedure.

<sup>249</sup> See, e.g., N.D. SUP. CT. R. 9.3.

<sup>250</sup> See OHIO REV. CODE ANN. § 119.03(A) (Page 1978).

should be formalized so that the public will in fact receive proposals with adequate time to submit comments. The preserving of public proposals and official comments will enhance understanding by the rulemaker as well as by the public. The establishment of standing committees will increase the opportunity for public input and open channels of communication.

The supreme court should consider these methods for increasing public participation in rulemaking. These proposals, although simple, conform to basic democratic principles and will result in more effective, practical rules.

