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Jeffrey A. Parness

Sandra B. Freeman

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The Process of Factfinding in Judicial Rulemaking: "Some Kind of Hearing" on the Factual Premises Underlying Judicial Rules*

Jeffrey A. Parness†
Sandra B. Freeman††

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* While influenced by Judge Friendly's thinking in "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975), ours is not a constitutional analysis. Although exercise of a legislative function by a legislature or its delegate has not been constrained by constitutional limits, *see, e.g.,* *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 511 F.2d 949, 952 (10th Cir.), *cert. denied*, 423 U.S. 875 (1975), in large part because of the reading given *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), legislatures and their delegates are often more representative, and usually more accessible, than judicial rulemakers. *See, e.g.,* *People ex rel. State Bd. of Equalization v. Pilcher*, 56 Colo. 343, 373-74, 138 P. 509, 519-20 (1914) (indicating the procedures for information gathering and decisionmaking by the agency involved in the *Bi-Metallic* case). The day may come when the Constitution requires due process in all forms of lawmaking. *See* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 17-1 to -3 (1978). To date, the Constitution at best requires "structural justice" only when legislation affects substantial constitutional values. *See, e.g.,* *Women's Health Services, Inc. v. Maher*, 514 F. Supp. 265, 272-75 (D. Conn. 1981).

† Associate Professor of Law, Northern Illinois University. B.A., Colby College; J.D., University of Chicago. This author wishes to thank publicly Mark Cordes and Dan Reynolds for their help with this article.

†† Clerk, Ohio Court of Appeals, Ninth Appellate District. B.A., Kent State University; J.D., University of Akron.

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I. Introduction

Judicial promulgation of generally applicable rules involving the administration and operation of American judicial systems has been increasingly criticized during the past decade as both too secretive and too closed. There now exists a solid consensus that greater "public process"¹ is needed in judicial rulemaking.² Perhaps in response, some judges and legislators are changing the ways in which judges adopt or help adopt rules by making judicial rulemaking procedures more open and more accessible.³

1. See, e.g., Weinstein, *Reform of Federal Court Rule-Making Procedures*, 76 COLUM. L. REV. 905, 933 (1976). As used in this article, public process means public access to, and participation in, the various judicial rulemaking procedures that are used to adopt judicial rules.

2. Some of the earliest, and the most influential, commentaries include Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975), and a series of works by Judge Jack Weinstein, including Weinstein, *supra* note 1. Other significant commentaries include Hazard, *Undemocratic Legislation* (Book Review), 87 YALE L.J. 1284 (1978) (finding Lesnick's proposals "attractive"); Oakes, Book Review 78 COLUM. L. REV. 205 (1978) (finding it difficult to disagree with Judge Weinstein); Wright, Book Review, 9 ST. MARY'S L.J. 652 (1978) (adoption of Weinstein's suggestions as a package would result in a significant improvement); Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977) (criticizing federal judicial rulemaking in the habeas corpus area); Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851, 909, 913, 1012-13 (1981) (criticizing the secretive way in which the evidentiary rule on statements against penal interest was proposed to Congress).

For recent commentary regarding public process in state judicial rulemaking, see Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31 (1982); Parness & Manthey, *Public Process and Ohio Supreme Court Rulemaking*, 28 CLEV. ST. L. REV. 249 (1979); Hellman, *The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal, and Policy Questions*, 31 OKLA. L. REV. 509 (1978).

3. See, e.g., *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice & Procedure*, 98 F.R.D. 347 (1983); 28 U.S.C. § 2077(b) (1982) (requiring each court of appeals to appoint an advisory committee for the study of the rules of practice and internal operating procedures); Nev. Rules on the Administrative Docket, reprinted in 1 NEV. REV. STAT. (1979) [hereinafter cited as NEV. R. AD. DOCKET]; Rule on Proc. R., Admin. R. & Admin. Ord. of the N.D. Sup. Ct. (adopted

For example, some judicial rulemaking procedures have become better known through their formal establishment by law;⁴ meetings at which judicial rules are discussed have been opened to the public;⁵ meaningful notice and opportunity to be heard have been afforded interested persons prior to judicial rule promulgation;⁶ and records of judicial rulemaking activity have been maintained.⁷

Although there is widespread agreement that the movement toward more open and accessible rulemaking procedures is long overdue, there is also recognition that the particular means of implementing public process judicial rulemaking procedures may need to vary. One factor bearing on the need for variation is the scope of the judicial rulemaker's authority: public process for narrow, technical rules should be different from public process for rules affecting sensitive issues of social policy.⁸ A second factor is the nature of the judicial rulemaker's authority: public process should be different for fettered or advisory judicial

March 15, 1978) [hereinafter cited as NDRPR]; WASH. REV. CODE ANN. § 2.52.010 (Supp. 1984-1985) (creation of Judicial Council); Wash. Sup. Ct. Gen. R. 9.1 to 9.9 (supreme court rulemaking procedure). One notable legislative failure involves the efforts to modify all of the Federal Rules Enabling Act. See Clinton, *supra* note 2, at 83-84 n.387 (describing proposals of former Representative Holtzman).

4. See, e.g., 28 U.S.C. § 2077(b) (1982) (appellate court advisory committees); Miss. CODE ANN. § 9-3-65 (1975) (advisory committee on civil procedure rules); NDRPR, *supra* note 3, at § 8 (standing committees on joint procedure, attorney standards, judiciary standards, and court services); WASH. REV. CODE ANN. § 2.52.010 (Supp. 1984-1985) (judicial council).

5. NDRPR, *supra* note 3, at § 3 (requiring notice of most proposed rules, and either supreme court or standing committee hearings); Wash. Sup. Ct. Gen. R. 9.7(b) (Supreme court may hold hearings on proposed rules.); NEV. R. AD. DOCKET, *supra* note 3, at § 7.2 (Supreme court's study committee may hold hearings.).

6. NDRPR, *supra* note 3, at § 7.1 (notice of proposed rule changes to be sent to various lawyer and non-lawyer groups within the state); *id.* at § 3.1 (Any person can petition the supreme court for a rule change.); Wash. Sup. Ct. Gen. R. 9.6 (Proposed rules approved by supreme court are to be published for comment during January, and comments may be forwarded until last day in April.).

7. NEV. R. AD. DOCKET, *supra* note 3, at § 2 (Docket kept noting all rulemaking activity; other records kept as required by the chief justice.); Wash. Sup. Ct. Gen. R. 9.6(c) (All comments regarding proposed rules to be kept on file in the office of the clerk of court for public inspection and copying.). See also JUD. CONF. OF U.S., REP. OF PROCEEDINGS 54-55 (1980) (Judicial Conference decides to make available on request Advisory Committee documents and Standing Committee recommendations).

8. Wright, *supra* note 2, at 656; Parness, *Public Process and State-Court Rulemaking* (Correspondence), 88 YALE L.J. 1319, 1322 (1979).

rulemaking than for unfettered judicial rulemaking.⁹

Although the recent attempts at implementing public process in judicial rulemaking are commendable, they are often deficient because the factfinding process underlying the rulemaking activity is inadequate. In the following pages we examine varying procedures for making determinations of adjudicative and legislative facts on which new judicial rules are based.¹⁰ Without significant improvement in the manner in which judicial rulemakers recognize, debate, and resolve these facts, any progress toward open and accessible rulemaking procedures will be marginal. Before suggesting the various ways in which a public process judicial rulemaking procedure can better promote accurate factual determinations, we briefly review the contemporary forms of judicial rulemakers, rules and rulemaking procedures and present illustrations of how different judicial rulemakers have determined relevant adjudicative and legislative facts underlying new judicial rules. It is our hope that our suggestions will improve the procedures judicial rulemakers use

9. Unfettered judicial rulemaking encompasses situations where the judicial rulemaker has final authority to make judicial rules. In contrast, fettered judicial rulemaking involves a setting in which a judicial rulemaker's proposed rules may become final, but only after review by a nonjudicial rulemaker, usually the legislature. Advisory judicial rulemaking embodies judicial rule consideration by a judicial rulemaker with no power whatsoever to adopt a judicial rule, and often is exercised by an advisory committee to the rulemaker having the power to adopt final rules. Parness, *supra* note 8, at 1323; Weinstein, *supra* note 1, at 929-30 (Even when legislative review of judicial rulemaking is authorized, such review should be confined to "the basic policy issues.").

10. The distinction between adjudicative and legislative facts may be explained as follows:

Adjudicative facts are the facts about the parties and their activities, business, and properties. . . . [They] are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958). This distinction was first developed by Professor Davis in an article entitled *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-16 (1942). It is based in part on the opposite results reached in *Londoner v. Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

Adjudicative and legislative facts are involved in many different proceedings, such as traditional lawmaking and agency rulemaking. Distinctions between adjudicative and legislative facts are important not only in terms of statutory requirements attending the different proceedings, *see infra* note 33, but also because the procedures must vary depending upon the kind of fact in issue. For a discussion of the different factfinding procedures, *see text accompanying notes 224-37*.

to recognize, debate, and resolve factual issues germane to judicial rules.

II. Contemporary Judicial Rules, Judicial Rulemakers, and Rulemaking Procedures

Our concern is with the manner in which certain kinds of judicial rules are developed by designated persons or bodies assigned the task of discussing and implementing rule developments. Thus, our discussion must define "judicial rules" and identify the persons and bodies who work with them.

A. *Judicial Rules*

We employ the term "judicial rules" to refer to rules that affect the administration and operation of a judicial system and which have been formally incorporated into some type of legislative enactment. Legislative enactments include sets of procedural rules such as the Federal Rules of Civil Procedure,¹¹ as well as statutory schemes such as the seminal Field Code,¹² and perhaps constitutional guarantees like the right to trial by jury in civil cases.¹³ Excluded rules are nonconstitutional rules adopted during the course of litigation,¹⁴ as well as informally adopted rules.¹⁵

Judicial rules are often classified by: the courts in which they apply, the subject matter of the cases to which they apply, and their nonsubstantive or procedural nature. Thus, there are trial and appellate court rules; civil, criminal, bankruptcy and admiralty rules; and rules of practice and procedure which do not infringe upon substantive rights. A more functional classifi-

11. For detailed background on Congressional delegation of civil procedure rulemaking power to the Supreme Court, and its subsequent exercise, see Burbank, *The Rules Enabling Act of 1934*, 130 U. OF PA. L. REV. 1015 (1982).

12. For a brief history of modern civil procedure legislation and the influence of David Dudley Field, see F. JAMES & G. HAZARD, *CIVIL PROCEDURE* §§ 1.6-.7 (2d ed. 1977).

13. U.S. CONST. amend. VII.

14. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 513-14 (1975) (prudential concerns underlying decisions on standing); *Hickman v. Taylor*, 329 U.S. 495 (1947) (work product and attorney-client privilege); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention).

15. See *Proceedings of a Session of the Conference of Metropolitan District Chief Judges on Rules and Rulemaking*, 79 F.R.D. 471, 481-82 (1978) (remarks of Joiner, J.).

cation suggests that most judicial rules serve to regulate at least one of three forms of conduct: (1) the conduct of lawsuits; (2) the conduct of those people who practice law outside the confines of a lawsuit; or (3) the conduct of those people who staff the courts.¹⁶ Thus, there are judicial rules on pleading, discovery and trial practice,¹⁷ rules of professional conduct for attorneys and judges,¹⁸ and rules regarding record keeping.¹⁹ To regulate any of these forms of conduct, a judicial rule may seek to promote one or more of the following goals: procedural fairness, economy, efficiency, compliance with other judicial rules or substantive justice.²⁰

B. *Judicial Rulemakers*

The responsibility for molding judicial rules is often delegated either constitutionally or legislatively to several judicial rulemakers. Judicial rulemakers are those individuals or groups who possess some decisionmaking responsibility for judicial rules. Judicial rulemakers include at least one judge of a court of the relevant judicial system.²¹ In many American judicial sys-

16. Parness & Manthey, *Public Process and State Judicial Rulemaking*, 1 PACE L. REV. 121, 123-24 (1980).

17. Not all rules governing the conduct of lawsuits relate solely to litigation. Thus, civil procedure rules and evidence rules on privileges apply both in and out of the courtroom.

18. Of course, not all professional conduct rules relate to legal practice outside the confines of a lawsuit; rules governing an attorney's duty regarding the use of perjured testimony serve as but one example. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-26 (1982).

19. See FED. R. CIV. P. 79(a) (Clerk shall keep a book known as the civil docket.).

20. Thus, the Federal Rules of Civil Procedure are to be "construed to secure the just, speedy and inexpensive determination of every action," FED. R. CIV. P. 1, and the Illinois Code of Civil Procedure is to be "liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." ILL. CODE CIV. & CT. R. § 1-106 (1983). At times application of a judicial rule can serve to promote one or more of the goals while detracting from another. For example, a rule may prompt consideration of dismissal on the merits of an apparently meritorious claim because of a procedural error.

Regarding administrative agency rules, Dean Cramton has suggested the competing considerations to be balanced are accuracy, efficiency and acceptability. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972).

21. See, e.g., 28 U.S.C. § 331 (1982) (Judicial Conference includes the Chief Justice of the United States, together with circuit and district judges.); WASH. REV. CODE ANN. § 2.52.010 (Supp. 1984-1985) (Judicial Council includes judges of various courts, state sen-

tems more than one judicial rulemaker is involved in the decisionmaking process concerning a single set of judicial rules. In these circumstances, judicial rulemakers include those who possess only fettered or advisory rulemaking power.²² Finally, since delegations of rulemaking authority vary in many American judicial systems according to the type of judicial rule, judicial rulemakers include those who possess rulemaking power over only some of their system's judicial rules.²³

C. *Judicial Rulemaking Procedures*

Judicial rulemaking procedures are the methods judicial rulemakers use to carry out their decisionmaking responsibilities. These methods usually vary from rule to rule even for a single judicial rulemaker, although quite often common characteristics pervade all instances of decisionmaking. Variations are justified because certain judicial rules are bound to have dramatic social consequences while others are not;²⁴ certain judicial rules inevitably will be subject to subsequent oversight by another rulemaker while others will not;²⁵ and certain judicial rules

ators, law school deans, members of the bar, the attorney general, and a county clerk).

22. Fettered judicial rulemaking power contains the prospect that a judicial rulemaker's proposed rules might not become effective because of some subsequent non-judicial rulemaker's action, typically a legislature's veto. Advisory judicial rulemaking occurs when the rulemaker is itself without the authority to effect judicial rule changes, and thus only serves to counsel some later stage judicial or nonjudicial rulemaker on the need for judicial rule alterations. *See supra* note 9. The U.S. Judicial Conference is an advisory judicial rulemaker, 28 U.S.C. § 331 (1982), but the U.S. Supreme Court largely possesses fettered judicial rulemaking power, 28 U.S.C. §§ 2072, 2076 (1982).

23. In Oregon, the supreme court is chiefly responsible for administrative superintendence, and attorney admission and disciplinary rules, while the Council on Court Procedure is the major rulemaker in the civil procedure area. *See infra* text accompanying notes 191-95.

24. As Professor Wright noted:

Drafting procedural rules is a difficult technical task, best performed by skilled professionals, rather than by a committee as carefully balanced as were delegations to the 1972 Democratic Convention. But this is true only so long as the rules are addressed to strictly technical questions of procedure. If rules are going to have a substantive effect on sensitive issues of social policy, then it does become important that those who draft the rules represent a cross-section of views on these policy matters.

Wright, *supra* note 2, at 656.

25. *See Parness, supra* note 8, 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.").

concern a relatively small number of persons who are exceptionally affected while other rules do not.²⁶

Notwithstanding these variations, commentators have recently encouraged some consistency in rulemaking methodology to help ensure efficiency in rulemaking, as well as to promote openness and accessibility of the rulemaking procedures. Specifically, proponents of public process judicial rulemaking have urged that judicial rulemaking procedures be relatively fixed and made known to the public;²⁷ provide adequate notice and opportunity to be heard;²⁸ require that a reasoned basis of final decision constitute part of the record to be kept;²⁹ and that they

One judicial rulemaker that has only some of its judicial rules reviewed by another rulemaker is the Ohio Supreme Court. See *infra* text accompanying notes 146-51.

26. The due process implications of this distinction are reviewed in *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973).

27. E.g., Lesnick, *supra* note 2, at 580. What Professor Lesnick noted about the U.S. Judicial Conference is equally true of many other American judicial rulemakers:

In authorizing the Judicial Conference to "carry on a continuous study of the operation and effect" of the rules and to recommend changes in them to the Supreme Court (28 U.S.C. § 331), Congress said nothing about the procedure by which the conference should carry out the task. 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 also would find itself required to face explicitly the question whether its procedures now provide adequate means for obtaining a broad range of input.

Id. It should be noted that the Judicial Conference recently undertook some corrective action. See *Procedures for the Conduct of Business by the Judicial Conference on Rules of Practice & Procedure*, 98 F.R.D. 347 (1983).

28. Again, Professor Lesnick's comments are instructive:

It should be borne in mind that the process of promulgating rules is essentially a legislative one. To say that is not to assert that it must be carried on only by the Congress. The point is rather that, just as the legislature has set up procedures designed to encourage the citizenry to make its views known and to make it more likely for members of Congress to become aware of varying inputs, so judges and advisors to judges, when acting in a legislation-writing capacity, should use procedures similarly democratic in their conception.

Lesnick, *supra* note 2, at 580-81. On the particular means of providing notice and opportunity, see Parness & Manthey, *supra* note 16, at 134-39.

29. See Parness & Manthey, *supra* note 16, at 139-41. One contemporary illustration of the difficulties that can follow a rulemaker's failure to supply a reasoned basis involves the federal rule of evidence on the marital communications privilege. See Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 683-84 (1975).

allow for public initiative.³⁰ While these calls are laudable, they typically stop short of describing in detail the precise ways that the suggestions can be implemented. Moreover, when these calls have been heeded, laws seeking to promote more public process judicial rulemaking have typically left the judicial rulemaker with too much discretion to implement a more open and accessible process.³¹ It is our hope that the following discussion of factfinding during judicial rulemaking will spur further efforts to establish and refine public process judicial rulemaking procedures.

III. Factfinding During Judicial Rulemaking

To evaluate the propriety of judicial rules, judges are called upon to perform tasks quite different from those normally performed when they hear a case. The differing tasks usually involve legislative and adjudicative functions.³² Judges are not the only ones who have a duty to distinguish between a legislative function and an adjudicative function; administrative agencies must do it all the time.³³

30. See Parness & Manthey, *supra* note 16, at 143-44. While proponents of public process judicial rulemaking typically rely on common sense and general democratic principles, two commentators recently urged that reliance could be premised on the first amendment right of access. Parness & Copeland, *Access to Judicial Rulemaking Procedures*, 1982 ARIZ. ST. L.J. 641.

31. See, e.g., Spitzer, *supra* note 2. Spitzer calls the Washington Supreme Court's issuance of General Rule 9 a "step forward," but still inadequate for it includes only "a vague reference to public hearings," no commitment on holding hearings for important or controversial rule changes, no standards concerning when public testimony is appropriate, and no comment on when judicial rulemakers should open their deliberations to public observation. *Id.* at 63-64. See also Parness & Manthey, *supra* note 16. The authors find significant differences in the notices and opportunities for comment prior to the adoption of various rules by the Ohio Supreme Court. These differences are unrelated to either the type of rule involved or the rulemaking authority utilized. *Id.* at 135-39.

32. For the nonadjudicative and nonlegislative duties of judges, see Remington, *Circuit Council Reform: A Boat Hook for Judges and Court Administrators*, 1981 B.Y.U. L. REV. 695, 702-03.

33. The Administrative Procedure Act differentiates between "rulemaking" (formal and informal) and "adjudications." Compare 5 U.S.C. § 553 (1982) (rulemaking procedure) with *id.* § 554 (adjudication procedure). The due process requirements differ for each proceeding. The dividing line separating rulemaking and adjudicating may not always be "bright." See *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245 (1973). The task of differentiating between adjudicative and legislative facts in the agency setting is important because the standards of judicial review vary for the differing

To perform either a legislative or adjudicative function, judges must undertake factfinding responsibilities very similar to those of any agency. Moreover, to make judicial rules, judges must undertake responsibilities similar to those undertaken by a legislative body such as the United States Congress, or an American state's general assembly.³⁴ So, one would expect to find at least some similarity between the factfinding process employed during a trial or by a traditional legislative body and the process employed by a judicial rulemaker. Unfortunately, such similarities are frequently missing. The judicial rulemaker usually utilizes inferior factfinding procedures.

Adjudicative facts involve issues of "who did what, where, how, why, with what motive or intent."³⁵ Legislative facts, on the other hand, involve general issues "which help the tribunal decide questions of law and policy and discretion."³⁶ At times, a legislator must determine an adjudicative fact and an adjudicator must determine a legislative fact.³⁷ Different considerations are involved in legislative and adjudicative factfinding,³⁸ and

types of factual determinations. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978); *City of Charlottesville v. FERC*, 661 F.2d 945, 957 (D.C. Cir. 1981).

For one influential judge's view on the manner in which agencies should go about the task of finding both legislative and adjudicative facts, see Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 909-26 (1980).

34. By viewing rulemaking judges as legislators, we take an expansive view of legislation, and thus, we do not limit ourselves to acts of a body whose chief function in government is to formulate general rules of law that primarily reflect the prevailing social notions of utility and value. Compare Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 2 (1978) (taking a narrow view) with *Supreme Ct. of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980) (taking a more expansive view).

35. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 12.3 (2d ed. 1979). At times, adjudicative facts underlying the legislating by federal administrative agencies are characterized as "specific facts." See, e.g., *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1163-64 (D.C. Cir. 1979), cert. denied 447 U.S. 921 (1980).

36. K. DAVIS, *supra* note 35, § 12.3.

37. Legislators are said to be able to distinguish adjudicative facts for they are sufficiently narrow in focus, and sufficiently material to the outcome, so that it is reasonable and useful for the legislator to resort to a trial-type procedure to resolve them. *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d at 1164.

38. An early example recognizing the significance of differences between adjudicative and legislative facts in adjudication is found in Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 403-04 (1942) (describing a category of facts in constitutional cases which assists a court in forming a judgment on a question of constitutional law). See also *Bally Mfg. Corp. v. N.J. Casino Control*

therefore factfinders should utilize different methods for these two factual categories. Further differentiation is required because there are several subcategories of both legislative and adjudicative facts.³⁹ Illustrations of the utilization of different methods of factfinding for different categories of fact abound in the area of administrative law.

In their role as adjudicators, judges of American judicial systems are now being pressed to alter their factfinding procedures when the litigation involves broad policy issues and thus legislative factfinding.⁴⁰ In such cases, judges stray from their role as passive umpires, which is appropriate only for the dispute-resolution form of litigation in which there exists a conflict on the application of adjudicative facts to the well-understood and developed law.⁴¹ In socially significant cases, judges are said to have a responsibility for ensuring that all pertinent evidence is introduced. Thus, the judges are deemed required to encourage the participation of those with evidence on and interests in the broad policy issues even though all participants cannot be recognized as formal parties to the litigation.⁴² In effect, judges are urged to vary their factfinding procedures for certain litigation because legislative facts are involved. Similarly, judicial

Comm'n, 85 N.J. 325, 344 n.4, 426 A.2d 1000, 1010 n.4, *appeal dismissed*, 454 U.S. 804 (1981) (Handler, J., concurring).

39. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 813 (judgmental and predictive facts); *Aetna Life Ins. Co. v. Mitchell*, 101 Wis. 2d 90, 127, 303 N.W.2d 639, 656 (1981) (Abrahamson, J., dissenting) (factual, legal and discretionary findings).

40. See, e.g., Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Shuman, *Decisionmaking Under Conditions of Uncertainty*, 67 JUDICATURE 326 (1984). For an illustration of altered factfinding procedures, see *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1328-29 (E.D.N.Y. 1981).

41. See Fiss, *supra* note 40, at 17. See also Chayes, *supra* note 40, at 1282-84.

42. See Fiss, *supra* note 40, at 26 ("It seems almost absurd to rely exclusively on the initiatives of those persons or agencies who happened to be named plaintiff and defendant. The judge must assume some affirmative responsibility to assure adequate representation . . ."); Chayes, *supra* note 40, at 1297 ("The courts, it seems, continue to rely primarily on the litigants to produce and develop factual materials, but a number of factors make it impossible to leave the organization of the trial exclusively in their hands."). See also Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (encouraging adequate interest representation during the new forms of administrative agency action); Chayes, *The Supreme Court 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (discouraging view on the U.S. Supreme Court's continuing failure to distinguish certain socially significant cases adequately).

rulemakers are being encouraged to vary their procedures for factfinding according to the type of factual issue involved.⁴³

The factual issues germane to the advisory committee's recommendations to change Federal Civil Procedure Rule 11, which deals with the signing of pleadings, illustrate that both adjudicative and legislative factfinding underlie judicial rulemaking decisions. The notes of the Advisory Committee on rules concerning the 1983 amendment to Rule 11 state:

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signings of pleadings. . . .

Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . . There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading . . . or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings . . . and (3) the range of available and appropriate sanctions. . . . The new language is intended to reduce the reluctance of the courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.⁴⁴

When the Advisory Committee discusses the practical "experience" under Rule 11, it is resolving issues that involve adjudicative facts. Specifically, the Committee found that there were abuses in the signing of pleadings and that there is confusion among the members of the federal judiciary and the bar on the import of Rule 11. When the Committee, as rulemaker, discusses its aim to reduce the reluctance of judges to impose sanctions, it is resolving issues akin to legislative facts. Specifically, it found that federal policy should continue to favor checking abuses in the signing of pleadings and that this policy would likely be fur-

43. In its discretion, the Washington Supreme Court may hold hearings on proposed rules; and it will order any approved proposed rule published for comment, though the court may "invite persons familiar with the rule to provide additional information." Wash. Sup. Ct. Gen. R. 9.5(b); *see also* Wash. Sup. Ct. Gen. R. 9.5(a), 9.7(b). The rules do not elaborate on any guidelines for hearings, the nature of comment, or who may be invited and under what circumstances. The North Dakota Supreme Court can grant one petitioning for a rule change, an opportunity for written comment or oral hearing; no elaboration can be found, however, on the circumstances under which any such comment or hearings will be requested. *See* NDRPR, *supra* note 3, § 3.3.

44. Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 198 (1983) (citations omitted).

thered by the adoption of the proposed changes in Rule 11.

The need for varying the factfinding procedures becomes apparent when one considers who might best assist a Rule 11 rulemaker to stop the abuse of pleadings and remove confusion at the bar. Regarding the prevalence of abuse and confusion, presumably all of the judges and lawyers (and perhaps litigants) involved in cases governed by Rule 11 constitute the group most able to assess the experience under the rule. Because it would not be feasible or economical for the committee, in a rulemaking role, to speak to all (or even most) of that group, the committee may seek to gauge the group's assessment by a survey, a poll, or the like. Regarding the desirability of continuing to employ Rule 11 in an effort to deter pleading abuses, those with experience in regulating attorney conduct and those with experience in educational programs for attorneys (assuming ignorance is the cause of some abuse) have something to say about whether a particular rule of civil procedure is the most effective social means of altering abusive legal practices.

While judicial rulemakers should be cognizant of their factfinding duties and the variation in the types of relevant factual issues, a review of American judicial rulemakers and their actions reveals that the necessary understanding is not always present. A clear articulation of the relevant adjudicative and legislative facts is often missing.⁴⁵ The following examples illustrate that when the factfinding procedures of judicial rulemakers are not varied according to the type of factual issues involved, the accuracy and legitimacy of the factual findings are undermined.

IV. Illustrations of American Judicial Rulemaking Procedures

A. *Federal Judicial Rulemaking on Discovery*

One set of judicial rulemakers who were particularly sensitive to their factfinding duties were the array of entities involved in recent federal rulemaking concerning civil discovery. After briefly identifying the entities responsible for discussing and proposing civil discovery rule changes, we will examine their re-

45. The following illustrations of American judicial rulemaking activities were chosen because of the variations in the form of judicial rulemaker, judicial rule, and judicial rulemaking authority (unfettered, fettered or advisory).

cent conduct.

1. *The Rulemakers*

Since 1958, federal judicial rulemaking has been accomplished through the efforts of several judicial rulemaking bodies.⁴⁶ These bodies include the United States Supreme Court, the United States Judicial Conference, the Administrative Office of the United States Courts, and the Federal Judicial Center. Although its role in the rulemaking process has been described as "largely formalistic,"⁴⁷ the Supreme Court has broad rulemaking powers. The Court's powers include the authority to prescribe trial and appellate rules for civil and criminal actions;⁴⁸ amendments to the rules of evidence;⁴⁹ and admiralty and bankruptcy rules.⁵⁰

A more active federal judicial rulemaker is the U.S. Judicial Conference, which is charged with the duty of studying and recommending to the Supreme Court changes in the Court's prescribed rules.⁵¹ Assisting the Conference are various committees such as the Standing Committee on Rules of Practice and Proce-

46. For an in-depth look at some judicial rulemaking activities in the late 1930s, after passage of the Rules Enabling Act of 1934, see Burbank, *supra* note 11. On the promulgation of judicial rules prior to the Enabling Act, see 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1002 (1969). On rulemaking between 1939 and 1956, see *id.* § 1006. For a discussion of the changes in federal judicial rulemaking in 1958, which included the establishment of the U.S. Judicial Conference as the primary actor in the rulemaking process, see *The Rule Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1957). For a review of an earlier post 1958 exercise of federal judicial rulemaking, see Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601 (1964).

47. Order Amending the Federal Rules of Civil Procedure, 85 F.R.D. 521, 521 n.1 (Powell, J., dissenting statement). See also Friedenthal, *supra* note 29, at 685 (criticizing the Court for being "a mere conduit for the work of others"); *id.* at 676 (suggesting the Supreme Court was "lulled into complacency by Congress' 40 years of acquiescence regarding proposed rules").

48. See 28 U.S.C. § 2072 (1982) (rules regarding practice and procedure of the district courts and courts of appeals in civil actions); 18 U.S.C. § 3771 (1982) (rules regarding practice and procedure in criminal cases in district and other courts).

49. 28 U.S.C. § 2076 (1982).

50. 28 U.S.C. § 2072 (1982) (rules of practice and procedure for admiralty and maritime cases); 28 U.S.C. § 2075 (1982) (rules of practice and procedure in cases under title 11).

51. 28 U.S.C. § 331 (1982). Conference recommendations often take the form of proposed new or amended judicial rules.

dure.⁵² While such assistance often proves invaluable to the Conference, the different advisory committees to the Standing Committee constitute the core of the federal judicial rulemaking process. These advisory committees on civil, criminal, admiralty, bankruptcy, appellate, and evidence rules, are typically the first federal judicial rulemaker to discuss in-depth proposed rule changes.

Before discussing the proposed changes, the advisory committees usually conduct an investigation into the relevant subject areas of the rules.⁵³ The advisory committees' investigations are often aided by the work of two federal entities, which are not traditional judicial rulemakers.⁵⁴ The first entity is the Administrative Office of the United States Courts. It is charged with preparing "statistical data and reports as to the business of the courts,"⁵⁵ and with submitting through its director to the Judicial Conference "recommendations" on the operation of the federal judicial system.⁵⁶ The second entity is the Federal Judicial Center, which is charged with conducting "research and study" of the operation of federal courts,⁵⁷ providing "staff, research, and planning assistance to the Judicial Conference of the United States and its committees,"⁵⁸ and with recommending improvements in "the administration and management of the courts of the United States."⁵⁹

52. C. Wright & A. Miller, *supra* note 46, § 1007.

53. For a list of the advisory committee membership, see *id.* (Supp. 1983).

54. Although not customarily included in discussions of federal judicial rulemakers, the Director of Administrative Office of U.S. Courts may promulgate rules and regulations approved by the Judicial Conference. See 28 U.S.C. § 604(e) (1982). The Director of Administrative Office of U.S. Courts may make necessary rules and regulations regarding matters such as the use of certified interpreters; the statistical data relating to the business of the courts; the accommodations for the judicial, clerical and administrative officers of the federal courts; and the establishment of pretrial services in criminal cases. *Id.* § 604(f).

55. *Id.* § 604(a)(2).

56. *Id.* § 604(a)(3).

57. *Id.* § 620(b)(1).

58. *Id.* § 620(b)(4).

59. *Id.* § 620(b)(2). For a recent description of the Center's research activities, see Levin, *Research in Judicial Administration: The Federal Experience*, 26 N.Y.L. SCH. L. REV. 237, 243-61 (1981).

2. *The Rulemaking Procedure: Federal Discovery Rules*

One advisory committee investigation involved possible civil rule changes regarding discovery. In an April, 1976 speech on pretrial civil practice, Chief Justice Burger said that "after more than 35 years' experience with pretrial procedures, we hear widespread complaints that they are being misused and over-used."⁶⁰ These complaints led him to request that the United States Judicial Conference's Standing Committee on Rules of Practice and Procedure "conduct hearings on any proposals the legal profession considers appropriate."⁶¹

Sparked by these and other comments,⁶² the President of the American Bar Association appointed a Task Force to ensure that the ideas discussed "would be carefully considered by those organizations or agencies best able to evaluate and implement them."⁶³ A few months later the Task Force recommended that the A.B.A. Section on Litigation, in coordination with the A.B.A.'s Judicial Administration Division, "should accord a high priority to the problem of abuses in the use of pretrial procedures with a view to appropriate action by state and federal

60. Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 83, 95 (1976).

61. *Id.* at 96.

Sources other than a judicial system's leader can trigger inquiries. For example, the Chairman of the Iowa Supreme Court's Advisory Committee on Rules of Civil Procedure recently prompted an empirical study of discovery practices in Iowa state courts, in order to prepare a discussion of the application of new federal discovery rules to the lower court practice. Letter of Professor David S. Walker to Jeffrey A. Parness, (Nov. 3, 1983) (available in Pace Law Review office).

62. The Chief Justice made his remarks at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Other speakers at the Conference voiced similar concerns regarding pretrial discovery practices. See, e.g., Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96 (1976). Rifkind states:

I believe it is fair to say that currently the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.

Id. at 107. See also Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976) (A typical complaint is that a large antitrust suit causes "massive and unequalled invasion of privacy and business records.").

63. A.B.A., *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 165 (1976).

courts.”⁶⁴ In addition, it recommended that procedural rules provide for, and be used to, sanction attorneys who needlessly extend litigation.⁶⁵ The Task Force’s recommendations noted the “paucity of data available for an adequate understanding of the reasons for the critical problems of judicial administration.”⁶⁶ Addressing the abuse of the processes of civil discovery, the Task Force said: “Empirical data concerning the types of cases in which abuse is most likely to occur, the nature and extent of the abuse, and the utility of remedies which have been tried may prove helpful.”⁶⁷

The Section on Litigation created an ad hoc Special Committee for the Study of Discovery of Abuse, which began work in August, 1976.⁶⁸ The Special Committee solicited input from the American College of Trial Lawyers, the Federal Judicial Center, the Conference of Metropolitan Chief Justices, and the Office for Improvements in the Administration of Justice of the U.S. Justice Department.⁶⁹ The Special Committee also solicited input by circulating a questionnaire published in its newsletter.⁷⁰ Vari-

64. *Id.*, at 171.

65. *Id.*

66. *Id.* at 206. The lack of data was repeatedly noted at the Conference as well. *See, e.g., Sander, Varieties of Dispute Processing*, 70 F.R.D. 111, 133 (1976); Walsh, *Improvements in the Judicial System: A Summary and Overview*, 70 F.R.D. 223, 228 (1976) (“As Dr. Nader also pointed out, we don’t have the data and the empirical studies to support many of our instinctive suggestions.”). Earlier, Professor Wright had noted:

The sixth, and last, of the limitations on procedural reform is the imperfect state of our knowledge. We know very little about how present procedures work. We know even less well what changes might produce improvement in the future. If I had the power to put into effect tomorrow any change in procedure I thought desirable . . . I would not know what to recommend to meet future needs. There is much truth in Professor Hazard’s remark that “procedural scholarship is groping in a fog.”

Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 578 (1967) (quoting G. HAZARD, RESEARCH IN CIVIL PROCEDURE 3 (1963)).

67. A.B.A., *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. at 192. Even when data is available, it is difficult to read. *See Rosenberg & King, Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579, 588 (Duplicative, cumulative and disproportionate discovery calls for change in discovery rules.); Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We’re Not There Yet*, 1981 B.Y.U. L. REV. 597, 602 (Nub of discovery abuse problem is unnecessarily broad discovery.).

68. *See Spann, Abuse of Discovery: Some Proposed Reforms*, 25 N.C. ST. B.Q. 3, 4 (1978).

69. *Id.*

70. The questionnaire appears in 2 *Litigation News*, Apr. 1977, at 13. It contains

ous publications kept the members of the bar informed of the Special Committee's work and invited their comments.⁷¹ The final Special Committee report was published and was circulated to the bench and bar in late 1977.⁷²

This Special Committee report was considered by the Advisory Committee to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in late 1977 and early 1978.⁷³ Most of the report was then circulated to the bench and bar for written comment between March 31 and November 30, 1978.⁷⁴ Public hearings were held for two days in Washington and Los Angeles in October and November of 1978.⁷⁵ While comments were being received, the standing and advisory committees had the additional advantage of a Federal Judicial Center report on discovery practices that was "based on a detailed study of more than three thousand cases selected in six federal district courts."⁷⁶ This report provided statistical descriptions of the civil litigation process. The report was supplemented by the work of statisticians and other professionals, who designed the data collection and processing instruments, ran the calculations, performed the statistical analyses, and verified the data.⁷⁷ The report specifically dealt with the op-

both objective (Are discovery procedures in federal courts being abused?) and subjective (Should sanctions be stiffened?) questions. The committee received over 600 responses to its questionnaire. The results are briefly reviewed in the *Progress Report — Special Discovery Committee*, 2 *Litigation News*, Apr. 1977, at 10.

71. See, e.g., Lundquist & Schechter, *The New Relevancy: An End to Trial by Ordeal*, 64 A.B.A. J. 59 (1978) (soliciting input to Special Committee after its first report was issued).

72. The report is summarized in *Cure Proposed for Discovery Abuse*, 3 *Litigation News*, Jan. 1978, at 1; Lundquist & Schechter, *supra* note 71; *Discovery Reform Pushed by A.B.A. Committee*, 63 A.B.A. J. 1691 (1977). Soon after publication of the final Special Committee report, a branch of the United States Justice Department endorsed the report's proposals. *Cure Proposed for Discovery Abuse*, *supra*, at 2.

73. *Second Report of the Special Committee for the Study of Discovery Abuse*, 5 *Litigation News*, Apr. 1979, at 9.

74. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 616 (1978) [hereinafter Preliminary Draft] (The March draft indicated comments and suggestions would be welcomed until July 1, 1978.); see also Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 524, 539 (1980) [hereinafter Amendments] (indicating that the date for input was extended due to many requests for added time for comment).

75. Amendments, *supra* note 74, at 539-40.

76. *Id.* at 540.

77. Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Pro-*

eration of the federal rules governing discovery. It covered more than seven thousand docketed requests appearing in the more than three thousand terminated cases studied.⁷⁸ Prior to completing the report, these researchers also conducted a telephone survey of randomly selected attorneys who practiced in the six courts studied to check the reliability of the case approach.⁷⁹ The final report admittedly did not study "discovery abuse" as such; its focus was on the quantity rather than the quality of discovery requests.⁸⁰ Yet, it did note that its data suggested that "discovery abuse . . . does not permeate the vast majority of federal filings"; that, contrary to the common view, federal judges frequently grant sanctions for discovery abuse; and that the imposition of "strong judicial controls" would shorten the time consumed by discovery without impairing discovery rights.⁸¹

At approximately the same time, the Federal Judicial Center published a survey of the literature on the discovery process since the 1970 amendments to the federal civil discovery rules.⁸² The survey identified common threads emanating from the literature as a whole, made a rule-by-rule analysis of the dissatisfactions expressed with the discovery rules and of the reforms proposed for those rules, and summarized the survey's findings and conclusions.⁸³ The survey was based on a canvass of scholarly legal journals, bar association journals and publications, non-legal journals, books, legislative materials and the Federal Rules Decisions.⁸⁴

Finally, during this time the Federal Judicial Center also released a survey of discovery practices used in the various district courts.⁸⁵ The survey was intended to develop an inventory of

cess: *Discovery*, FED. JUD. CENTER REP., June 1978, at xiii (FJC-R-78-4).

78. Levin, *Foreword* to *id.* at xi.

79. Connelly, Holleman & Kuhlman, *supra* note 77, at 95 app. C.

80. Levin, *supra* note 78, at xi.

81. *Id.*

82. Segal, *Survey of the Literature on Discovery from 1970 to the Present: Expressed Dissatisfaction and Proposed Reforms*, FED. JUD. CENTER REP., July 1978 (FJC-R-78-5).

83. *Id.* at 1.

84. *Id.* at 2-8.

85. See Guyer, *Survey of Local Civil Discovery Procedures*, Fed. Jud. Center Staff Paper (1977) (FJC-SP-77-1).

discovery procedures.⁸⁶ This survey specified the areas of judicial concern about discovery, as well as the techniques developed by the judiciary for handling problems with discovery.⁸⁷ The study was not designed to make qualitative evaluations about the various techniques being utilized.⁸⁸

All of the above studies were available on request from the Federal Judicial Center. Also, copies, accompanied by a letter from the Federal Judicial Center Director soliciting comments on the studies, were sent to several law professors and to law libraries.⁸⁹ The Advisory Committee received comments on the studies, and on ways in which the factual data contained in the studies was employed by the Committee in its early formulation of the proposed rules.⁹⁰

Although an evaluation of the methodology and the use of the Federal Judicial Center studies on discovery is beyond the scope of this Article, it is clear that extensive research was undertaken, that the resulting studies were made available to interested parties and to the judicial rulemakers, and that the studies and comments were considered by members of the Advisory Committee. There is evidence that certain criticisms of the research may have influenced the Advisory Committee's final draft of the proposed amendments.⁹¹ Clearly, the A.B.A. Special Committee report and the Federal Judicial Center studies served as a significant data base for the Advisory Committee decisions reflected in its drafts of the proposed rule changes.

The first preliminary draft of amendments, issued in March, 1978, was accompanied by Advisory Committee Notes and was published in West's Advance Sheets together with a let-

86. See *id.* at 3-7.

87. See *id.* at 10-22.

88. *Id.* at 2.

89. See Letter from A. Leo Levin to Jeffrey A. Parness (Dec. 9, 1978) (available in Pace Law Review office).

90. See, e.g., Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475; *Second Report of the Special Committee for the Study of Discovery Abuse*, 5 *Litigation News*, Apr. 1980, at 9.

91. See Schroeder & Frank, *supra* note 90, at 475 (ed. note). See also Amendments, *supra* note 74, 85 F.R.D. at 540-44. Since this final draft in 1979, further studies on discovery have occurred, Flegal & Umin, *supra* note 67, at 600-01, and have prompted further action by the Advisory Committee and the United States Supreme Court. See, e.g., Advisory Committee Note to Fed. R. Civ. P. 26(g) (indicating consideration of new data regarding discovery abuse).

ter inviting comments from the bench and bar.⁹² Trade journals printed synopses of the proposed changes and repeated the Committee's request for comment.⁹³ This first draft was reviewed by the Advisory Committee in light of the written and oral comments received. The Committee decided to modify some of its proposals, withdraw others, and continued to recommend still others. A revised preliminary draft of the proposed rule changes, accompanied by Advisory Committee Notes responding to some of the comments previously received, was then circulated for further comment in February, 1979.⁹⁴ After a final consideration of all the factual data available, the Advisory Committee completed a final draft of the proposed amendments, which was submitted to the Standing Committee.

The Standing Committee reviewed the proposals and made a few technical changes.⁹⁵ More substantially, it deleted a proposed new rule giving a district court judge the authority to notify the Attorney General or other government official of conduct by a government representative which the judge considers improper. This change was based on the Standing Committee's belief that district court judges already had this authority.⁹⁶ With the approval of the Advisory Committee Chairman, the Standing Committee added a paragraph to the Advisory Committee Notes explaining the district court authority.⁹⁷

The Standing Committee submitted the revised proposals to the Judicial Conference, which formally approved them and submitted them to the Supreme Court. The Court approved the amended rules,⁹⁸ with three justices dissenting.⁹⁹ The dissent did not find the rules inherently objectionable, but felt the proposals fell short of those needed to accomplish sufficient reform in civil litigation.¹⁰⁰ The dissenting justices also noted that the Court

92. Preliminary Draft, *supra* note 74.

93. See, e.g., *Judicial Conference Boosts Discovery Reform*, 64 A.B.A. J. 821 (1978); *Actions on Federal Rules*, 10 THIRD BRANCH 6 (1978).

94. See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323, 326-27 (1980).

95. Amendments, *supra* note 74, at 538.

96. *Id.* at 537.

97. *Id.*

98. Order Amending the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980).

99. *Id.* (Powell, J., dissenting statement).

100. *Id.*

and the Judicial Conference had relied on the work of the Standing and Advisory Committees, and that the Court's role in the rulemaking process was thus largely formalistic.¹⁰¹

Among the more significant factual findings was the Advisory Committee determination that discovery abuse could be best prevented by court intervention as soon as abuse is threatened,¹⁰² and that this threat arises when opposing attorneys are unable to reach agreement on a discovery plan.¹⁰³ The Committee considered, and rejected, other means of preventing abuse, including narrowing the scope of discovery and limiting the number of questions in interrogatories.¹⁰⁴ Instead, the Committee added a new provision on discovery conferences.¹⁰⁵ Another major finding was that many interrogated parties exercising the option of producing business records had abused it.¹⁰⁶ This finding led to a rule change creating new responsibilities for those exercising that option.¹⁰⁷ A third major finding involved abuses under the old rule relating to production of documents for inspection.¹⁰⁸ This finding led to a new rule involving responsibilities of parties producing such documents.¹⁰⁹

At least with this set of rules, it is clear that once the final set of proposed changes was issued by the Advisory Committee, most of the factfinding had ended. However, because federal judicial rulemaking authority is fettered, in that the rules cannot be adopted without the opportunity for congressional alteration,¹¹⁰ further factfinding and policymaking were possible after

101. *Id.* at 521 n.1.

102. Advisory Committee Note to FED. R. CIV. P. 26(f). *See also* Amendments, *supra* note 74, at 526.

103. Advisory Committee Note to FED. R. CIV. P. 26(f).

104. *Id.*

105. *See* FED. R. CIV. P. 26(f)(5). *See also* Amendments, *supra*, note 74, at 526.

106. Advisory Committee Note to FED. R. CIV. P. 33(c).

107. *See* FED. R. CIV. P. 33(c). *See also* Amendments, *supra* note 74, at 530-31.

108. Advisory Committee Note to FED. R. CIV. P. 34(b).

109. *See* FED. R. CIV. P. 34(b). *See also* Amendments, *supra* note 74, at 532.

110. General rules for civil actions prescribed by the United States Supreme Court "shall not take effect until they have been reported to Congress . . . and until the expiration of ninety days after they have been thus reported." 28 U.S.C. § 2072 (1982).

A recent example of congressional alteration occurred when Congress amended Rule 4(a) of the Federal Rules of Civil Procedure. *See* Pub. L. No. 97-227, 96 Stat. 246 (1982) (codified as amended at 28 U.S.C. § 2071 (1982)); Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1982) (codified as amended

Supreme Court consideration. In this instance, the proposed changes in the discovery rules were submitted to Congress with the Advisory Committee comments, and there was no further detailed inquiry. The changes were forwarded to the House Judiciary Committee by the Chief Justice on May 1, 1980, and these changes went into effect on August 1, 1980, without significant comment or debate on the floor of either federal legislative chamber.¹¹¹

B. *State Judicial Rulemaking*

Judicial Rulemaking in California

Federal judicial rulemaking is not the sole source of examples for judicial rulemaker sensitivity to factfinding responsibilities. In California, the judicial rulemaking mechanism can be commended for its judicial rulemakers' factfinding during recent rulemaking activities. A review of these rulemakers' factfinding activities follows a brief look at the relevant California rulemaking procedure.

1. *The Rulemakers*

California's Constitution created the Judicial Council, which serves a two-fold purpose: it acts as a permanent advisory body to the courts, the governor and the legislature, and it adopts rules for court administration, practice and procedure.¹¹² The Council is composed of the chief justice and one other judge of

at 28 U.S.C. § 2071 (1982)). Congressional deference to the courts in procedural rulemaking apparently ended in 1973. See Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 167-68 (1979). Perhaps congressional review of certain proposed procedural rules may be varied in light of *INS v. Chadha*, 103 S. Ct. 2764 (1983) (one house veto held unconstitutional).

111. A search of the Congressional Record from April 27 to August 1, 1980, shows no mention of the federal discovery rules, and a search of Congressional Information Service evinces no relevant data. See also 38 CONG. Q. WEEKLY REP. 2026 (1980). Although some press groups expressed concerns over the proposed discovery rules, the chairman of the relevant House Judiciary subcommittee decided not to hold hearings and otherwise refused to block the rules' promulgation. *Id.* At times, legislative comment regarding proposed rule changes has little to do with the rules themselves. See Nat'l L.J., Aug. 15, 1983, at 4, col. 39 (indicating that 1983 amendments to civil procedure rules took effect because of House-Senate disagreement on bankruptcy court policy).

112. CAL. CONST. art. VI, § 6.

the state supreme court, various lower court judges, members of the state bar, and a member from each house of the state legislature. While the chief justice names the judges who serve on the Council, the State Bar Association's Board of Governors and the state legislature each choose their own representatives.¹¹³ The composition of the Council and its selection process serves both to enhance the cooperation between the bar and the Council, and to strengthen the Council's influence in the legislature, since a continuous formal liaison between the bodies is assured.¹¹⁴

The Judicial Council often accomplishes its tasks with the help of committees. It has divided itself into four standing committees. The committees are on the appellate courts, superior courts, municipal and justice courts, and court management. Each committee is served by a permanent study group.¹¹⁵ The Council also appoints ad hoc advisory committees, which may include non-Council members; these select committees are designed for more narrowly described special studies that supplement the research projects carried out by the Administrative Office of the Courts.¹¹⁶ This arrangement permits the Council to draw on the expertise of the members of the bench, bar and public, and serves to broaden the base of participation in the rulemaking process.

In 1960, the Council created the Administrative Office of the Courts to serve as its staff. An Administrative Director of Courts is appointed by the Council and given the responsibility of running the Administrative Office.¹¹⁷ The Administrative Office carries out the research and pilot programs necessary to implement Council policies, and is responsible for daily court management. The Office employs a professional staff including management analysts, statisticians, technicians and lawyers.¹¹⁸ The staff helps "gather and analyze filing and general workload

113. *Id.*

114. Stolz & Gunn, *The California Judicial Council: The Beginnings of an Institutional History*, 11 PAC. L.J. 877, 890 (1980); Yakutis, *A Half Century of Judicial Council — State Bar Cooperation*, 52 CAL. ST. B.J. 446 (1977).

115. See Stolz & Gunn, *supra* note 114, at 880; 1978 JUD. COUNCIL CAL. ANN. REP. vi-vii (indicating committee membership).

116. Stolz & Gunn, *supra* note 114, at 880.

117. The Council acted pursuant to the California Constitution. See CAL. CONST. art. VI, § 6 ("The council may appoint an Administrative Director of the Courts.").

118. Stolz & Gunn, *supra* note 114, at 881.

statistics from the trial and appellate courts."¹¹⁹ It conducts the institutes and workshops sponsored by the Council.¹²⁰ It also publishes staff findings and recommendations in a Report of the Administrative Office that is appended to the annual report of the Judicial Council and which serves as a permanent data base for later Council decisions. In pursuing its rulemaking responsibilities, the Council often distributes its proposed and adopted rules to a large number of newspapers, legal publications, and commercial publishers. Thus, proposed amendments to the Rules of Court are typically published in the State Bar Journal with an invitation to comment.¹²¹

2. *Rulemaking on Appellate Practice in California*

In 1969, the Judicial Council undertook a rulemaking project that was to result in "the most substantial changes in the operating procedures of the Courts of Appeals since . . . 1905."¹²² This project was prompted by statistics compiled by the Administrative Office from 1961 to 1969, which demonstrated serious problems with the efficiency of the appellate court process and the need for reform.¹²³ When it undertook the project, the Council sought means of increasing the appellate courts' productivity without adding more judges or another trier of fact to the court system.¹²⁴

At the same time, the Administrative Office conducted its own research into improving the appellate process, including a study of appellate procedures in other states.¹²⁵ In addition, the Office ran a workshop sponsored by the Council in order to dis-

119. *Id.* at 881.

120. For a list of the 1969 workshops and institutes conducted, see 1970 JUD. COUNCIL CAL. ANN. REP. 59 [hereinafter cited as 1970 ANN. REP.].

121. *See, e.g.*, D. Pugh, C. Korbakes, J. Alfini & C. Grau, *Judicial Rulemaking in the State Courts: A Compendium* 20 (1984) (a research project of the American Judicature Society); Yakutis, *supra* note 114, at 448.

122. 1970 ANN. REP., *supra* note 120, at 24 (footnote omitted).

123. Statistics revealed an increase in the number of filings and in the number of appeals pending per justice, an increase in the number of written opinions, and the common occurrence of an 18 to 25 month delay between the filing of a notice of appeal and the filing of an opinion. *Id.*

124. *See id.* at 25. It was noted that between 1960 and 1969, the number of appellate court justices had risen by 129%. *Id.* at 24.

125. *Id.* at 24 n.1.

cuss possible new operating procedures to meet the caseload crisis.¹²⁶ Clearly, the Council sought at an early stage to hear and exchange views of those people directly involved in the perceived problems of the appellate process who would be responsible for implementing any subsequent rule changes. In advance of the workshop, participants were provided with the Administrative Office study on appellate procedures in other states as well as the staff's suggestions for improvements in California.¹²⁷ Additionally, the Administrative Office enlisted for the workshop speakers from other states to report on the effectiveness of the suggestions.¹²⁸ The workshop culminated in a "consensus statement" approved by the participants that outlined immediate and long range steps to be taken to meet the workload problem. The statement was published as an appendix to the 1970 Annual Report.¹²⁹

In order to implement the workshop recommendations, the Council proposed several rule revisions. These revisions called for: (1) adding a substantial number of research attorneys, organized into a central staff for pre-hearing work; (2) appointing Administrative Presiding Justices to supervise the research staff and to perform other administrative duties; and (3) using memorandum decisions to dispose of cases that do not present substantial legal issues.¹³⁰ These proposed revisions appeared in the 1970 Annual Report, and were submitted to the judges on the courts of appeal for comment and suggestions. After changes in light of input, new rules were adopted by the Council in 1970.¹³¹

Although the new rules reflected the recommendations of the majority of appellate judges, later these same judges were reluctant to confer any substantial duties on the central staff and unwilling to make use of the memorandum opinions.¹³² Thus, problems with the docket overload and delay continued.

In 1972, a special committee on appellate courts of the State

126. See *id.* at 59. The theme was "The Crisis in California's Appellate Courts," and the workshop brought together 35 of the state's 44 justices on the Court of Appeals. *Id.*

127. *Id.* at 24 n.1.

128. Stolz & Gunn, *supra* note 114, at 894.

129. 1970 ANN. REP., *supra* note 120, at 30.

130. *Id.* at 24-25.

131. *Id.* at 27.

132. Stolz & Gunn, *supra* note 114, at 894.

Bar Association recommended that an additional court be created and inserted between the courts of appeal and the state supreme court. It was suggested that this new court review cases that would be suitable for supreme court consideration.¹³³ A contemporary proposal called for the creation of additional appellate courts, with a corresponding increase in the number of judges.¹³⁴ The various alternatives were vigorously debated in newspapers, legal publications and law review articles,¹³⁵ prompting the legislature to request a formal study by the Judicial Council.¹³⁶

In 1973, the Judicial Council concluded a study that included the report of the State Bar Association's Special Committee, as well as proposals by several appellate court justices.¹³⁷ The Council rejected the Special Committee's recommendations and opposed any increase in the number of appellate districts.¹³⁸ In short, the Council adhered to its original position and asked the legislature to authorize a further increase in staff attorneys.¹³⁹ Nevertheless, the Council, recognizing the wide differences of opinion on appellate court reform, recommended that an in-depth study be made by an impartial expert group.¹⁴⁰

The National Center for State Courts subsequently conducted extensive interviews with appellate judges and court personnel, and collected and analyzed other statistical data on the California appellate court system. A summary of the Center's report was printed in the 1975 Annual Report of the Judicial Council, and comments on its recommendations were

133. *The Court of Review: A New Court for California*, 47 CAL. ST. B.J. 28, 34 (1972); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971).

134. Stolz & Gunn, *supra* note 114, at 894.

135. See, e.g., L.A. Metropolitan News, Mar. 30, 1972, at 1, col. 3; Lascher, *Lascher at Large*, 47 CAL. ST. B.J. 200 (1972); Janofsky, *The State Bar Looks at Appellate Reform*, 48 CAL. ST. B.J. 367 (1973); Chilton, *Appellate Court Reform: The Premature Scalpel*, 48 CAL. ST. B.J. 393 (1973); Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures*, 4 PAC. L.J. 1 (1973); Hufstedler, *California Appellate Court Reform — A Second Look*, 4 PAC. L.J. 725 (1973).

136. Stolz & Gunn, *supra* note 114, at 895.

137. 1973 JUD. COUNCIL CAL. ANN. REP. 13, 19-21.

138. *Id.* at 21.

139. *Id.* at 22.

140. *Id.*

solicited.¹⁴¹

The Council considered the Center's recommendations for a year, and, in its 1976 Annual Report, published a summary of the Council's response.¹⁴² While agreeing in principle with the Center's conclusion "that the appellate courts should carry a direct responsibility to insure prompt completion of the steps necessary before the court can begin review of the case,"¹⁴³ the Council rejected the Center's recommendation to replace the divisional court structure with three-judge panels. In the end, the Council made only minor rule changes in response to the Center's study; it retained its original position, stressing the 1969 consensus statement.¹⁴⁴

Thus, the 1976 changes in the appellate court rules were founded on the principles initially adopted by the Judicial Council in 1970. Although a majority of appellate judges had approved the 1969 consensus statement, the initial implementation met with judicial resistance. Yet after several years of further debate and study, these same judges began to follow the 1970 principles. This step increased efficiency (higher output-per-judge) and improved the management of the workload with only a modest increase in the number of judges.¹⁴⁵

What prompted the change in judicial attitude? Perhaps the information gathered by further research persuaded the judges to implement the rules adopted in 1970. Possibly, the opinions expressed in the various commentaries published after adoption swayed the judges in favor of implementation. It is also likely that the judges needed time to acclimate to the changes and to consider the opinions of their peers. While there is no definitive answer, it is interesting to note that the consensus statement was the outgrowth of the Council's two-day workshop that relied heavily on the early studies done by the Administrative Office. When the Council adopted new rules in 1970, it relied on the consensus statement and the early studies without soliciting active participation of other groups and without public

141. 1975 JUD. COUNCIL CAL. ANN. REP. 14.

142. 1976 JUD. COUNCIL CAL. ANN. REP. 33 [hereinafter cited as 1976 ANN. REP.].

143. *Id.*

144. *See id.* at 36.

145. Stolz & Gunn, *supra* note 114, at 895.

input. The judges' willingness to implement the rules came only after time, further impartial empirical study, and widespread public debate. Perhaps the experience suggests that public process is desirable during judicial rulemaking. In addition, it may suggest that certain judicial rule changes should be preceded not only by discussion with those affected, but also by limited experimentation with the proposed changes prior to any across-the-board change.

Inconsistent Judicial Rulemaking in Ohio

A more comprehensive review of rulemaking activities in a particular jurisdiction can reveal inconsistencies in a judicial rulemaker's procedures as well as differences in sensitivity to factfinding duties from one instance of rulemaking to another. Ohio is one such jurisdiction.

1. *The Rulemakers*

In 1968, voters in Ohio approved constitutional amendments granting their supreme court the power to promulgate rules governing superintendence over all state courts,¹⁴⁶ the practice and procedure in all state courts,¹⁴⁷ the admission to the practice of law,¹⁴⁸ and the discipline of persons admitted to law practice.¹⁴⁹ There is an important difference between the rules of superintendence, admission and discipline, and the rules of practice and procedure: the rules of practice and procedure must be submitted for review and possible veto to the state legislature before becoming effective.¹⁵⁰ Thus, the rules of practice and procedure are examples of fettered rulemaking, while the superintendence, admission and discipline rules are examples of unfettered judicial rulemaking power. The difference in rulemaking authority suggests that there might be differences in the rulemaking mechanisms employed by Ohio's judicial rulemakers.

146. OHIO CONST. art. IV, § 5(A)(1).

147. *Id.* § 5(B).

148. *Id.* § 5(C).

149. *Id.*

150. *Id.* § 5(B) (Rules take effect unless general assembly adopts a concurrent resolution of disapproval.). At times, legislative approval is not easily obtained by the court. Parness & Manthey, *supra* note 2, at 262-66.

However, while some differences in rulemaking mechanisms can be found, there is no consistent policy regarding the process of judicial rulemaking in Ohio.¹⁵¹

2. *The Rulemaking Procedure: Rules of Civil Procedure*

Inconsistency in rulemaking procedures is exemplified by reviewing some changes in the civil procedure rules. In May, 1968, shortly after passage of the constitutional amendment, the Ohio Supreme Court began its effort to promulgate new Ohio Rules of Civil Procedure.¹⁵² First, the court appointed an ad hoc Rules Advisory Committee, consisting of thirty-eight lawyers and judges and a small staff of law professors.¹⁵³ The Committee separated into twelve subcommittees, each considering various blocks of rules and each using the Federal Rules of Civil Procedure as a guide.¹⁵⁴ The Committee prepared a proposal, which was submitted to the Ohio Supreme Court late in December, 1968.¹⁵⁵ Then, the court began a series of conferences with the Committee staff to review each rule individually. Members of the Committee also appeared at many bar association meetings to review and discuss the proposed rules.¹⁵⁶ Publication of the draft rules in the journal of the Ohio State Bar Association, accompanied by a request for comments, began in November, 1968, and was completed by March, 1969.¹⁵⁷ Before submission of the rules to the legislature, a joint House and Senate select committee, consisting of three members from each chamber, as-

151. For an in-depth review of Ohio judicial rulemaking, see Parness & Manthey, *supra* note 2.

152. See Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO B. 727, 728 (1970).

153. The committee began its work in the summer of 1968. Harper, *Ohio Rules of Civil Procedure: A Symposium*, 39 U. CIN. L. REV. 465, 468 (1970).

154. Corrigan, *supra* note 152, at 728. Because of the differences between the Ohio and federal court systems, the committee felt it was impractical to adopt the federal rules verbatim. *Id.* The committee members made the initial decisions about adopting the federal rules without public input. The committee's staff notes, which consist of 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, thus providing a record for its decisions.

155. Harper, *supra* note 153, at 469.

156. *Id.* at 469-70.

157. See 41 OHIO B. 1399-1412, 1525-49 (1968); 42 OHIO B. 89-106, 223-43, 339-55 (1969).

sembled and began to review the rules. The Joint Committee's meetings were open to the public, and again, the state bar journal invited comments from interested persons.¹⁵⁸ The Ohio Supreme Court, in response to public comment, revised the rules and submitted them along with the Rules Advisory Committee's notes to the clerks of both houses of the Ohio legislature prior to January 15, 1970, a date mandated by the 1968 constitutional amendments.¹⁵⁹ These revised rules, along with an invitation for further public comment, appeared in the state bar journal in installments beginning in the October 6, 1969 issue.¹⁶⁰ Since the revised rules were published in installments, Rules 38-86 appeared only one day before their submission to the legislature.¹⁶¹ Nevertheless, the supreme court considered and accepted further suggestions after submission. Almost two years after the Rules Advisory Committee began its work, the final draft of the rules of civil procedure was adopted when the legislature chose not to exercise its veto power.¹⁶²

3. *The Rulemaking Procedure: Rules of Evidence*

A somewhat different process was used by the court in drafting Ohio's Rules of Evidence. An ad hoc Evidence Rules Advisory Committee and staff, composed of members of the bench, bar, and law professors was appointed by the court in June, 1975.¹⁶³ Four subcommittees were formed; each subcommittee handled a group of rules and each used the federal rules

158. See 42 OHIO B. 1321 (1969).

159. Pursuant to OHIO CONST. art. IV, § 5(B), proposed rules of practice and procedure are to be filed by the Supreme Court with the General Assembly not later than January 15th, and are to take effect on July 1st unless the Assembly adopts a concurrent resolution of disapproval.

160. See 42 OHIO B. 1201-17, 1243-58, 1415-43 (1969); 43 OHIO B. 21-51 (1970).

161. 43 OHIO B. 21-51 (1970). See Corrigan, *supra* note 152, at 729 (indicating submission occurred on January 13, 1970).

162. Since 1970, the Civil Rules Advisory Committee has been dissolved, with the maintenance of the rules (receipt and transmission of comments, etc.), chiefly the responsibility of a staff advisor on procedural rules. See Letter to Jeffrey A. Parness from David S. Hay, Staff Advisor on Procedural Rules (June 7, 1978); Letter to Jeffrey A. Parness from Professor Stanley E. Harper, Jr. (July 18, 1978) (copies on file with Prof. Parness).

163. O'Neill, *Symposium: The Ohio Rules of Evidence*, 6 CAP. U.L. REV. 515, 515-16 (1977); but see Blackmore, *The Ohio Evidence Rules: 105 Years of Heritage and Dilemma*, 6 CAP. U.L. REV. 533, 540 n.47 (1977) (indicating May 20th appointment).

as its model.¹⁶⁴ The publication of the proposed evidence rules differed from the installment publication of the rules of civil procedure. Without prior publication, the Committee submitted the completed draft of the suggested evidence rules to the Ohio Supreme Court accompanied by only the oral commentary of staff members.¹⁶⁵ The court reviewed the rules, made revisions, and published the revised rules without explanatory material. It did request public comment.¹⁶⁶ The court held hearings on the proposed rules in November, 1976, and approved the final draft early in December.¹⁶⁷ The rules of evidence were formally submitted to the legislature on January 12, 1977.¹⁶⁸ Following a procedure similar to the one that produced the civil rules, the legislature formed a six-member joint subcommittee to study the rules of evidence.¹⁶⁹ Again, the subcommittee held public hearings.¹⁷⁰ However, the only people who testified before the Committee during the three weeks of hearings were a representative of the Attorney General, who opposed adoption of the rules, and members of the Evidence Rules Advisory Committee.¹⁷¹

The General Assembly concurred with the Attorney General; it rejected the proposed rules of evidence in June, 1977.¹⁷² Commentators attributed the rejection, in part, to a belief that there was not enough time for adequate legislative consideration of the rules between the January 12 submittal date and the July 1 effective date prescribed by Ohio's Constitution.¹⁷³ Another

164. Miller, *The Game Plan: Drafting the Ohio Rules of Evidence*, 6 CAP. U.L. REV. 549, 552-53 (1977).

165. *Id.* at 554.

166. *Id.*; 49 OHIO B. 929 (1976).

167. Blackmore, *supra* note 163, at 540. At least one of the members of the Advisory Committee is unsure of precisely when the Supreme Court acted. Miller, *supra* note 164, at 554 n.8.

168. See O'Neill, *supra* note 163, at 516.

169. See Walinski & Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. 344, 348 n.21 (1978).

170. *Id.*

171. *Id.*

172. See *id.* at 348-49, 349 n.25.

173. *Id.* at 349. More time may be needed for legislative review of evidence rules than for civil procedure rules due to the persistent uncertainty as to whether the term "practice and procedure," OHIO CONST. art. IV, § 5(B), encompasses evidence. See, e.g., 409 U.S. 1132-33 (1972) (Douglas, J., dissenting); MO. CONST. art. V, § 5 (rules of practice and procedure explicitly said to exclude law relating to evidence). In addition, more time may also be required because of greater public interest in evidence rules, as compared to

significant reason for the rejection was that the evidence rules were not accompanied by the Evidence Rules Advisory Committee's notes. A legislative subcommittee noted in its report that since the proposed rules contained broad, general principles, the Advisory Committee's research and analysis would have been helpful in determining the impact of the proposed rules on existing Ohio laws.¹⁷⁴ On January 12, 1978, the court resubmitted the proposed evidence rules, again without any Advisory Committee commentary.¹⁷⁵ The General Assembly established another special subcommittee to study the law of evidence in Ohio and to report its findings by December 31, 1978.¹⁷⁶ By resubmitting the rules, the court forced the legislature to act by July 1, 1978 — six months before the deadline the legislature set for its own subcommittee's review. Again, time constraints as well as the lack of factual data and a written rationale helped to defeat the supreme court's proposals. This time, the General Assembly said the rules were not approved because the high court lacked constitutional authority to adopt rules of evidence. Moreover, the legislature did not find a sufficient need for new rules of evidence.¹⁷⁷

Perhaps the proposed rules would have fared better on resubmission if the Advisory Committee had attempted to alleviate the legislature's concerns. The need for evidence rules might have been demonstrated by circulating the results of research surveys indicating a perception of problems with the existing evidence law and a need for dramatic revision. Furthermore, the desirability of certain rules might have been better demonstrated if analogies were drawn to other jurisdictions with similar evidentiary provisions¹⁷⁸ and if studies were conveyed

rules of civil procedure. See Blakely, *A Short Introduction to the Ohio Rules of Evidence*, 10 CAP. U.L. REV. 237, 250-51 (1980). See also 28 U.S.C. §§ 2072, 2076 (1982) (indicating the differences in congressional review of the amendments to Rules of Civil Procedure and Rules of Evidence).

174. See Walinski & Abramoff, *supra* note 169, at 350.

175. *Id.* at 349 n.25.

176. *Id.*

177. Giannelli, *The Proposed Rules of Evidence: The General Assembly, Evidence and Rulemaking*, 29 CASE W. RES. 16, 20 (1978).

178. The Federal Rules of Evidence were slightly more than a year and a half old when the proposed rules of evidence were first submitted to the joint subcommittee of the General Assembly. The subcommittee pointed out that there was not much case law

demonstrating that a majority of the bench and bar favored the proposals. At the very least, the Advisory Committee could have explained its rationale for proposing the set of rules by including its own record of the deliberations with its proposals.¹⁷⁹

4. *The Rulemaking Procedure: Rules of Superintendence*

In contrast to the varying sets of rules of practice and procedure, Ohio's judicial rules of superintendence become effective *without* legislative review, upon adoption by the supreme court. When promulgating these rules, the court often employs a process different than that used for proposing rules of practice and procedure. Thus, rules of superintendence are often drafted by the high court's administrative staff,¹⁸⁰ a more permanent body than the ad hoc committees established for certain practice and procedure rules. Public comment on published, proposed amendments to the Municipal and County Court Rules, one set of superintendence rules, are often directed to the court's administrative director.¹⁸¹ The final commentary accompanying new superintendence rules and amendments are often written by members of the court's staff.¹⁸² Unlike the rules of civil procedure and the rules of evidence, the Ohio Supreme Court published its first set of superintendence rules, the Rules of Superintendence, only after they became effective. Nevertheless, proposed changes to these rules are often published in the state journal prior to adoption.¹⁸³

under the Federal Rules of Evidence. It questioned whether bench and bar were prepared to operate under rules that contained a different language and judicial philosophy. Walinski & Abramoff, *supra* note 169, at 354-55.

179. The Ohio Rules of Evidence went into effect on July 1, 1980, only after Staff Notes had been prepared and after some rules were further modified to differentiate the Ohio law from the federal law. Blakely, *supra* note 173, at 242, 247.

180. See Parness & Manthey, *supra* note 2, at 264.

181. See, e.g., 51 OHIO B. 815 (1978).

182. See, e.g., 8 OHIO REV. CODE ANN. 5 (Baldwin 1971) (Preface to Rules of Superintendence for Municipal Courts and County Courts).

183. See Parness & Manthey, *supra* note 2, at 265. In contrast, the second set of superintendence rules, dealing with municipal and county courts, were published over a year before their effective date. *Id.* More recently, Ohio Supreme Court rulemaking in the area of judicial conduct, which also occurs without legislative review, was criticized for lack of public notice and opportunity for public input. See 56 OHIO B. 160 (1983). See also Letter from Albert L. Bell, Counsel of the Ohio State Bar Association, to Jeffrey A. Parness (Aug. 10, 1983) (available in Pace Law Review office) (indicating no notice to

5. *The Rulemaking Procedure: Traffic Rules*

The mechanism for revising Ohio's traffic rules, which are apparently promulgated by the supreme court pursuant to statute,¹⁸⁴ present yet another variation. The traffic rules are the only rules which have a standing commission that reviews the rules every year. This review commission, created by the supreme court, has between five and eleven members; all members serve for three-year terms, and at least some members must be chosen from the ranks of specified judicial and police officers.¹⁸⁵ Although persons are free to express their interest in serving on the Commission, there appears to be no formal procedure for selecting the Commission's membership.¹⁸⁶ The Commission considers "[a]ll comments and suggestions concerning the application, administration and amendment"¹⁸⁷ of the traffic rules, and submits its recommendations to the supreme court.¹⁸⁸ Once drafted, the proposed traffic rules are generally published before their effective date, but without requests for comment.¹⁸⁹ Amendments to the traffic rules have been published as they become effective, with no advance notice.¹⁹⁰

From our review, it is clear that there is no consistent policy regarding the exercise of judicial rulemaking authority in Ohio. Some rule changes are drafted by diverse panels of experts with input permitted from all sectors of the public prior to court adoption, while others are formulated in relative obscurity by small groups. Some rules are subjected to ongoing review by permanent advisory bodies, while others are studied sporadically by ad hoc groups. Presently, most proposed rule changes are published only in the state bar journal. Although a uniform court

state bar association or others prior to the court's promulgation of changes to the Supreme Court Rules for the Government of the Bar of Ohio).

184. OHIO REV. CODE ANN. §§ 2935.17, 2937.46 (Page 1982). *See also* OHIO REV. CODE ANN. § 2935.17 (Page 1982).

185. OHIO TRAF. R. 22(B) (Anderson 1983).

186. Telephone conversation between Jeffrey A. Parness and Coit H. Gilbert, Administrative Director, Ohio Supreme Court (Apr. 18, 1979) (phone call made in response to Letter from Jeffrey A. Parness to Coit H. Gilbert (Apr. 13, 1979) (letter available in Pace Law Review office)).

187. OHIO TRAF. R. 22(A) (Anderson 1983).

188. *Id.* 22(C).

189. *See, e.g.*, 47 OHIO B. 885 (1974).

190. *See, e.g., id.* at 1499.

policy is not necessarily desirable, differences in policy should be geared to the type of rule and rulemaking authority. Since the Supreme Court of Ohio has failed to establish consistent rulemaking procedures, or to undertake particular judicial rulemaking activities in any consistent way, the process is inaccessible and often forecloses the receipt of information pertinent to the factual issues underlying judicial rules.

Statutory Restraints on Judicial Rulemaking in Oregon

One way to curb unnecessary variations in any judicial rulemaker's factfinding procedure is to legislate the manner in which that rulemaker must engage in rule inquiries. Oregon provides but one example of a jurisdiction where a judicial rulemaker must follow statutory procedures during certain rulemaking deliberations.

1. The Rulemakers

In Oregon, the power to make judicial rules is primarily vested in the state legislature. That body, however, has delegated much of its power. Statutes provide that the chief justice of the state's highest court has general administrative authority over the courts of the state, and may make rules and orders consonant with this authority.¹⁹¹ In addition to its general administrative authority, the Oregon Supreme Court possesses the power to adopt rules for civil and criminal proceedings regarding the form of written process, notices, motions and pleadings,¹⁹² and the power to make rules to coordinate class actions.¹⁹³ This unfettered rulemaking power is, however, specifically limited to rules of superintendence; the court is denied the power to make rules of civil or criminal procedure.¹⁹⁴ Finally, the court has the statutory authority to approve rules of procedure on the admis-

191. See OR. REV. STAT. § 1.002(1) (1983) (recognizing the court as "the highest judicial tribunal of the judicial department," but leaving the chief justice with responsibility for exercising "administrative authority and supervision" over state courts).

192. See OR. REV. STAT. § 1.006 (1983).

193. See *id.* § 1.004.

194. Such a limitation seemingly springs from OR. REV. STAT. § 1.735 (1981), although the limitation seems less clear since the law was amended. See *id.* § 1.002(1).

sion and discipline of members of the bar.¹⁹⁵ Rules of superintendence and bar admission and discipline, promulgated by the court pursuant to these statutory bases, are not subject to subsequent legislative review.

2. *The Rulemaking Procedure: Rules of Civil Procedure*

Prior to 1977, the Oregon legislature exercised the power to adopt rules of civil procedure. However, members of the bench and bar often called for reform of both the rules themselves and the process by which the rules were made.¹⁹⁶ Thus in 1977, the legislature created the Council on Court Procedure, a permanent rulemaking body charged with reviewing the civil procedure laws, studying proposals concerning civil procedure advanced by interested persons, and promulgating rules governing pleading, practice and procedure.¹⁹⁷ Unlike the unfettered rulemaking authority vested in the supreme court for matters of superintendence, the rules adopted by the Council must be submitted to the legislature for review.¹⁹⁸

The Council is composed of a supreme court judge, an appellate court judge, six circuit court judges, two district court judges, twelve lawyers and one public member.¹⁹⁹ In addition to being subject to Oregon "sunshine laws," the Council must hold at least one public hearing in each of the state's congressional districts on an annual basis.²⁰⁰ Furthermore, the Council must notify all members of the state bar of any meeting at which final action is expected to be taken on the promulgation, modification

195. See *id.* §§ 9.005(6), 9.490 (indicating court approves rules on these matters adopted by the board of governors of the bar).

196. See Kirkpatrick, *Procedural Reform in Oregon*, 56 OR. L. REV. 539, 540 (1977).

197. For background on the legislative creation of the Council, see Kirkpatrick, *supra* note 196, at 563-67.

198. OR. REV. STAT. § 1.735 (1983) provides:

The rules thus adopted and any amendments . . . shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

199. *Id.* § 1.730(1). The judges are selected by members of their respective courts, or by a judge's association; the lawyers are appointed by the state bar board of governors, pursuant to OR. REV. STAT. § 1.730(1)(e) (1983); and the public member is selected by the Oregon Supreme Court. *Id.*

200. *Id.* § 1.740(2).

or repeal of a rule. This notice must be published or distributed at least two weeks prior to a meeting and must include the time, place and agenda of the meeting.²⁰¹ Finally, the Council must make a copy of its proposals available to anyone on request.²⁰²

Soon after the legislation creating the Council was passed, members were appointed and meetings began. By December, 1977, the Council published a schedule of its regular meeting times and places.²⁰³ To supplement these public hearings, the Council invited the public to submit written and oral comments at its regular meetings.²⁰⁴ The Council divided into subcommittees in the areas of pleading, discovery, process and trial procedure.²⁰⁵ The input from the public hearings was considered and debated among the Council members, and as a result, a number of tentative decisions were published in the spring of 1978.²⁰⁶ At that time the Council also requested further public comment.²⁰⁷

By October, 1978, the Council had prepared a tentative draft of new rules of civil procedure, and a summary of some of the proposed rules appeared in the state bar journal.²⁰⁸ The full text of the proposals was published in the Oregon Appellate Courts' Advance Sheets and in material distributed by the Bar's Continuing Legal Education Committee. In compliance with the statute, the Council made full texts available to any interested person on request. A public hearing was held on November 3, 1978, for oral comment on the Council's proposals. Notice of the meeting, including the time, place and a description of the agenda, was published along with further requests for written comments.²⁰⁹ Notice of the December 2, 1978 meeting, at which the Council contemplated taking final action on the proposals, was published a month before the meeting was held. When the proposed new rules were adopted, they were submitted to the

201. *Id.* § 1.740(3)(b).

202. *Id.* § 1.740(3)(c).

203. *See* 38 OR. ST. B. BULL., Dec. 1977, at 12.

204. *Id.*

205. 38 OR. ST. B. BULL., May 1978, at 11.

206. *See id.*

207. *Id.* at 12.

208. *See* 39 OR. ST. B. BULL., Oct. 1978, at 32-36.

209. *Id.* at 33. Notice of the meeting was published one month before the meeting was actually held.

legislature for approval.²¹⁰ A joint committee considered the rules over a three-month period, and made changes before the rules became effective on January 1, 1980.²¹¹ While the rules were being considered by Oregon's Legislative Assembly, a summary of the portions most significant to Oregon lawyers appeared in the state bar journal.²¹²

Autonomy and Judicial Rulemaking in Oklahoma

In the absence of any statute or rule mandating a procedure for rulemaking, the judicial rulemaker is free to employ whatever methods it deems fit. A rather extreme example of how such unbridled discretion can lead to very poor factfinding, and perhaps poor rules, is found in the Oklahoma Supreme Court's rulemaking in the area of attorney advertising.

For many years the Oklahoma Supreme Court has exercised judicial rulemaking authority in the area of attorney professional responsibility.²¹³ In 1969, the Oklahoma Supreme Court instituted a Code of Professional Responsibility, which was based on the American Bar Association's model code.²¹⁴ In June, 1977, the decision by the U.S. Supreme Court in *Bates v. State Bar of Arizona*²¹⁵ effectively voided the provision in the Oklahoma Code of Professional Responsibility barring lawyer advertising.²¹⁶ Two months later, the Board of Governors of the Oklahoma Bar Association appointed a special committee to draft suggested changes in the Code in accord with *Bates*.²¹⁷ About four months after *Bates* was decided, the Oklahoma Su-

210. Comment, *Civil Procedure*, 16 WILLAMETTE L.J. 703, 704 (1980).

211. *Id.* at 704.

212. See *Forum* vol. 1, No. 7, insert to 39 OR. ST. B. BULL., June 1979.

213. See generally *Archer v. Ogden*, 600 P.2d 1223 (Okla. 1979); *Ford v. Board of Tax-Roll Corrections*, 431 P.2d 423 (Okla. 1967); *In re Integration of State Bar*, 185 Okla. 505, 95 P.2d 113 (1939).

214. Hellman, *supra* note 2, at 509 n.2.

215. 433 U.S. 350 (1977).

216. Although undermined by the decision in *Bates*, the Oklahoma Bar Association's president attempted to continue the total ban on lawyer advertising while the Oklahoma Code was being changed. See 48 OKLA. B.A. J. 1619 (1977). OBA's president advised Oklahoma lawyers that *Bates* "is not final and does not . . . change the Code of Professional Responsibility in Oklahoma which still prohibits advertising by lawyers." *Id.*

217. Hellman, *supra* note 2, at 517.

preme Court had before it the Board of Governors' proposed amendments to the section of the Code dealing with lawyer advertising. Very little information on the process by which the Board of Governors and its committee adopted these proposals filtered to either the bar association's membership or the public.²¹⁸

When the high court received these proposals, it acted quickly in what has been described as a "highly secretive" way.²¹⁹ Shortly after a meeting between "members of the Oklahoma Supreme Court and an uncertain number of officers and governors of the Oklahoma Bar Association," which was not open to the public,²²⁰ the court issued an order in January, 1978. This order outlined revisions in the Code's provisions on lawyer advertising along the lines recommended by the Board of Governors and its special committee.²²¹

Oklahoma revised its rules on lawyer advertising at a time when there was a high level of professional and public interest in the topic of lawyer advertising.²²² While other state high courts were promulgating judicial rule changes concerning lawyer advertising only after extensive professional and public debate, Oklahoma adopted its rules with virtually no public process.²²³

V. Hearings on the Factual Premises Underlying Judicial Rules

Our review of the different judicial rulemaking procedures demonstrates the prevalence of adjudicative and legislative facts during rulemaking deliberations. It illustrates the failure of certain judicial rulemakers to recognize the existence of significant

218. *See id.* at 517-18.

219. *Id.* at 522.

220. *Id.* at 519. The meeting was not announced to the public and the discussion was not recorded. *Id.*

221. The Board sought to restrict lawyer advertising whenever possible. Although the court allowed telephone directory page advertising notwithstanding the Board's call for disallowance, the court's rules restricted lawyer advertising to print media, as did the Board's proposal. *See id.* at 519 nn.67-68.

222. *See id.* at 522 n.86 and accompanying text.

223. *Id.* at 522. Other state courts have used similar procedures. *See Blackmar, The Missouri Supreme Court and Lawyer Advertising: RMJ and Its Aftermath*, 47 Mo. L. Rev. 621, 629-32 (1982) (Missouri court's committee report not preceded by public hearings and not circulated before or after court consideration).

factual issues during rulemaking deliberations. Moreover, it illustrates that some judicial rulemakers do not differentiate adequately between the types of factual issues if recognition does occur. In order to minimize these failures, rules or statutes are needed to govern the manner in which judicial rulemakers operate. The statutes should mandate that judicial rulemaking procedures provide for hearings on the adjudicative and legislative facts underlying the judicial rules under consideration. These hearings should not resemble the hearings conducted during litigation, because factual issues in rulemaking are quite different from factual issues in litigation.

As noted earlier, adjudicative facts in both litigation and in judicial rulemaking involve issues of "who did what, where, how, why, with what motive or intent."²²⁴ Although the "who" in litigation typically refers to only a few groups, including but not limited to the parties, the "who" in rulemaking typically involves a larger number of individuals and groups. Thus, while considering whether to impose a sanction under a civil pleading rule during litigation, a judicial officer often must resolve issues such as: who actually signed and filed the allegedly deficient pleading; how is the pleading deficient; what were the circumstances when the pleading came to be filed; and what were the purposes behind the particular filing. While considering possible changes in a court's authority to issue sanctions for civil pleading rule violations, a judicial rulemaker often must resolve issues such as: who may, and who usually does, file civil pleadings in that court; what types of deficiencies do civil pleadings typically include; and what are the circumstances in which deficient pleadings are filed. The adjudicative facts found by a judicial rulemaker who confronts pleading abuse are broader than the facts found by a judge during the course of litigation. Thus, the nature of adjudicative facts changes from the litigation to the rulemaking context.

In the rulemaking context, it is necessary to go beyond the singular occurrence before the court. For instance, information regarding facts about the abuse of pleadings in a judicial rulemaking context requires both observation and analysis of a large number of proceedings, rather than simply observing or

224. See *supra* note 35 and accompanying text.

participating in a single occurrence. These observations and analyses are rarely done as the proceedings accumulate. Unlike the judge, who has the information necessary to find an issue before him during most forms of litigation,²²⁵ a judicial rulemaker must often commission a study to find adjudicative facts.²²⁶ A judicial rulemaker can commission consultants or governmental officers to observe and analyze relevant occurrences as they occur or after they happen. For example, the Federal Judicial Center developed information on discovery practices during recent federal judicial rulemaking on discovery. Similarly, the National Center for State Courts studied appellate practice during the California Judicial Council's consideration of judicial rules on appellate court practice.

The determination of adjudicative facts underlies the adoption of many of the judicial rules which were discussed in Part IV. Opinions about adjudicative facts often instigate judicial rulemaking activity. The recent changes in the federal discovery rules were first triggered by individual perceptions of misuse and overuse of pretrial procedures.²²⁷ The changes in California appellate court practice were initiated after publication of statistics showing increasing appellate court caseloads.²²⁸ The study of civil procedural rules in Ohio began with the premise that the Federal Rules of Civil Procedure had worked so well that they merited strong consideration in Ohio.²²⁹

225. *Contra* Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 937-38 (1980); Lermack, *No Right Number? Social Science Research and the Jury-Size Cases*, 54 N.Y.U. L. REV. 951, 973-74 (1979) (suggesting that judges in litigation may sometimes be aided by collaborating with social scientists on studies related to issues in their cases). See *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980) (judge's impartiality may have been compromised by his law clerk's visit to and report on a malfunctioning machine, then the subject of a bench trial).

226. See *supra* notes 66-67 and accompanying text.

227. See *supra* notes 60-64 and accompanying text.

228. See *supra* note 123.

229. See *supra* note 154 and accompanying text. See also Harper, *supra* note 153, at 468 (indicating Chief Justice Taft requested the rules advisory committee to use the federal rules as a guide).

Findings of adjudicative facts underlie many of the other rule changes we have discussed. The federal judicial rulemakers' decision not to alter the provisions on the general scope to discovery was founded, in part, on the inability to identify and clearly define discovery abuse problems. Yet, the rules regarding the production of documents were altered due to findings of certain types of abuse. See Amendments, *supra* note 74, at 542. The Oregon Council on Court Procedures must have decided to maintain code or

In contrast to adjudicative facts involving who, what, where, why and how, legislative facts involve issues of "law, policy and discretion."²³⁰ Legislative facts are relevant in both litigation and judicial rulemaking. In the litigation context, issues of law, policy, and discretion are usually determined so that application can be made to the parties and others directly involved in the dispute being litigated.²³¹ By contrast, in the judicial rulemaking context, legislative determinations of issues of law, policy, and discretion are typically decided so that guidelines can be established for future conduct. Moreover, during judicial rulemaking the parties who are to be guided by a new judicial rule are not necessarily before the judicial rulemaker to provide insights that help resolve the issues.

Underlying the judicial rules discussed in Part IV are three different forms of legislative facts: current legal facts, discretionary judgments, and policy judgments. For example, federal judicial rulemakers determined during their recent revisions of the discovery rules that federal trial judges possess the authority to notify the Attorney General, or other government officers, of improper conduct by a government representative.²³² This determination is one form of legislative fact that is perhaps best characterized as a "current legal fact."

The federal rulemakers' determination that the adoption of the revisions to the discovery rules do not "fall short of those needed to accomplish reforms in civil litigation that are long overdue"²³³ illustrates the discretionary judgment of the rulemakers. It involves a decision about how far the law should

fact pleading in civil cases, and not to adopt notice pleading, in part, because the rigid pleading rules in Oregon had not been found to deter the filing of meritorious claims in the Oregon trial courts. See 38 OR. ST. B. BULL. 11, May 1978; 39 OR. ST. B. BULL. 1-2, Dec. 1979. Finally, the Oklahoma Supreme Court must have determined that any evils arising out of lawyer advertising in display ads in the classified sections of telephone directories were no different than the evils arising from other forms of permissible print ads, although the bar's Board of Governors disagreed. See Hellman, *supra* note 2, at 519.

230. K. DAVIS, *supra* note 35, at § 12.3.

231. Occasionally, determinations of issues of law, policy and discretion are held to apply prospectively. Of course, courts sometimes employ "dicta" to signal how law, policy and discretion will be applied in future litigation.

232. See *supra* text accompanying note 96.

233. Order Amending the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980) (Powell, J., dissenting statement).

go to carry out the policy underlying the new law.²³⁴ Discretionary judgments usually involve choices among several alternate ways a certain policy could be furthered. For example, discovery abuse could be rectified by criminal sanction, civil liability, or non-criminal sanctions such as censure.

The third form of legislative fact is that involving policy. It is exemplified by the federal rulemakers' decision that the law of federal discovery should frown on the deliberate mix of significant and insignificant documents in the hope of obscuring the significant ones.²³⁵

State judicial rulemakers' findings on all three forms of legislative fact can also be found. During the promulgation of a set of evidence rules, the Ohio judicial rulemakers determined that the Ohio Supreme Court did possess the constitutionally recognized authority to adopt rules of evidence.²³⁶ This is a "current legal fact" determination. Evidently, during the Oklahoma Supreme Court's promulgation of a new rule on lawyer advertising, a determination was made that public policy in Oklahoma should frown upon lawyers who advertise.²³⁷ This illustrates legislative factfinding that involves policy. A determination of discretion — to require complaining parties in civil suits to inform their adversaries of the factual basis of their grievances — is embodied in Oregon's system of code pleading.

VI. Principles for Hearings on Factual Issues in the Judicial Rulemaking Context

Because of the diversity of judicial rulemakers and judicial rules within the many American judicial systems, no single method of conducting hearings on any factual issues underlying

234. See *Aetna Life Ins. Co. v. Mitchell*, 101 Wis. 2d 90, 136, 303 N.W.2d 639, 660-61 (Wis. 1981) (Rule determinations sometimes turn on findings of fact, policy choices, risk assessment and predictions of the future.). See also *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978) (factual determinations of primarily a judgmental or predictive nature); see generally Davis, *supra* note 225, at 937 (suggesting category of "evaluative facts" needs to be added to judgmental or predictive facts).

235. See Amendments, *supra* note 74, at 532 (Advisory Committee Note to Fed. R. Civ. P. 34(b), which follows the suggestions of the A.B.A. Litigation Section Report on both adjudicative and legislative facts).

236. The Legislature did not agree. See *supra* text accompanying note 177.

237. See *supra* note 221.

judicial rules can be devised by judicial rulemakers. Nevertheless, the experiences of American judicial rulemakers do suggest several principles that should usually be followed in hearings on factual issues during judicial rulemaking proceedings. These principles relate to the process of recognizing, debating and resolving factual issues germane to judicial rules.

A. *Recognize the Factual Issues*

In undertaking any rulemaking responsibility, a judicial rulemaker must become sensitive to the different types of factual questions that underlie the judicial rules under discussion. Although it is appropriate for a judicial rulemaker to be prompted to consider new rules because of a perception that the present judicial rules are ineffective, and that the rulemaker has the authority to recommend or adopt more effective rules, these perceptions should be viewed as preliminary observations, subject to change if contrary information is presented. The responsibility for judicial rulemaking is not delegated to a judicial rulemaker because the rulemaker will inevitably resolve the necessary factual issues accurately. In fact, judicial rulemakers often lack substantial experience in the arena in which the judicial rules govern.²³⁸ Adjudicative factfinding involving how the present rules are understood and how they operate often requires an inquiry by social scientists. Legislative facts concerning the scope of the judicial rulemaker's authority sometimes compel the attention of those who are not involved or those who do not have a direct interest in the exercise of rulemaking authority.

Accordingly, at the beginning of deliberations on proposed judicial rules, judicial rulemakers should recognize the factual issues by spelling out the subject areas of the possible rule changes to be discussed. They should list the adjudicative and legislative factual premises supporting the decision to consider the subject areas, together with any significant drafts of proposed judicial rule changes and any commentary, regardless of origin. In addition, they should explain their authority to engage

238. Consider the possible inexperience of the "public member" of the Oregon Council on Court Procedures. See OR. REV. STAT. § 1.730(1)(f) (1983).

in the rulemaking discussion. This information should then be circulated to the interested parties.

The Advisory Committee on Civil Rules of the United States Judicial Conference performed these tasks commendably during its recent consideration of discovery rule changes. Although its factfinding inquiries were made easier by several groups interested in the Committee's work,²³⁹ the Committee ensured from the start of its work that all information assembled which was relevant to its factual inquiries was circulated in order to elicit valuable comments. If any criticism can be leveled, it is that the Committee appears to have relied on information gathered by, and involving, those engaged in legal practice. Perhaps private litigants subjected to discovery abuses, or prompting them, should have been heard.

By contrast, the Oklahoma Supreme Court's promulgation of a new rule on lawyer advertising was largely based on a bar association report that was founded on policy and discretionary determinations susceptible to much debate but which was never circulated for comment. Furthermore, the Ohio Supreme Court's early attempts to establish rules of evidence were largely founded on important Advisory Committee's findings that never accompanied the Committee's proposed set of rules when the court submitted those rules to the Ohio General Assembly for consideration. These findings included conclusions that the judicial rulemaking activity was legally proper and that Ohio policy on evidence should track federal policy. However, these conclusions were not supported by factual and analytical data. Therefore, these determinations were not accepted by the Ohio General Assembly.

Whether a judicial rulemaker involved in the early stages of judicial rule deliberations has reached tentative decisions about the relevant facts or has only identified the relevant facts, that rulemaker must possess the means by which the relevant facts can be further studied. This is so for no other reason than that it may be found upon further study that the judicial rulemaker has failed to recognize all relevant factual issues. Our illustrations of judicial rulemaking demonstrate that an "early-stage judicial

239. The A.B.A. Section on Litigation and the Federal Judicial Center provided reports on the abuse of pleading. See *supra* text accompanying notes 64-67, 76-81.

rulemaker" may be provided with information by groups, such as bar associations, who are interested in changing the judicial rules. However, the rulemaker cannot always rely upon these outside sources of information because they often do not exist. Even where they do exist, they may not be impartial.²⁴⁰

The federal judicial system provides an example of a system whose judicial rulemakers can gather information without relying on outside studies. Both the Administrative Office of the United States Courts and the Federal Judicial Center can perform studies to assist the various rulemakers within the Judicial Conference. The Administrative Office and the Federal Judicial Center are in regular communication with the judges and nonjudicial staff members of varying federal courts, and thus can easily both question and inform these members on matters pertinent to judicial rulemaking activity. On a local level, federal law mandates the creation of entities such as appellate court advisory committees and circuit judicial conferences which can also gather information for federal judicial rulemakers.²⁴¹

If external sources of information are needed, the American Bar Association and other non-governmental associations of lawyers, as well as individual lawyers admitted to practice before federal courts can be enlisted to help federal judicial rulemakers gather information. A recent illustration of a rulemaker that used both internal and external sources to gather information is the Judicial Conference's ongoing consideration of admission to practice standards for federal trial courts. While considering possible rule changes, the Conference has sponsored pilot programs in several trial courts and is monitoring closely the results of its experiments.²⁴²

240. "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.A. J. 1367, 1371 (1979).

241. See 28 U.S.C. § 2077(b) (1982) (appellate court advisory committees to study the rules of practice and internal operating procedures); 28 U.S.C. § 333 (1982) (circuit judicial conferences advise chief judges of the circuits on the means of improving the administration of justice).

242. 15 THIRD BRANCH 7 (1983). In large part, these experiments can be traced to two influential reports. Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 159 (1976) (known as the Clare Committee Report); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215 (1979)

Finally, it sometimes happens that problems with existing judicial rules are not immediately recognized by any judicial rulemaker or brought to its attention by any major outside sources. In such a case, it is imperative that a known and open channel of communication to the early-stage judicial rulemaker exists so that anyone who wants to suggest judicial rule changes can submit proposed changes, together with their reasons for present disenchantment.²⁴³ Establishment and use of this communicative channel would effectively allow a judicial rulemaking body to begin to gather information on judicial rules not yet formally the subject of any judicial rulemaker's deliberations. Thus, revision proposals could be followed by undertaking an internal study to be completed even before formal judicial rule deliberations begin.²⁴⁴

B. *Debate the Factual Issues*

Once an early-stage judicial rulemaker has reached firm, though not final, conclusions about the propriety of certain judicial rules and their underlying factual premises, more widespread debate on these conclusions and findings should begin. Of course, to ensure that all pertinent information is forwarded to the judicial rulemaker prior to any final conclusions, the interim conclusions should be widely circulated, to give those who want to comment an adequate opportunity to do so. The methods of circulation should depend upon the nature of the judicial rules under consideration; the more socially significant the rule, the more widespread the circulation should be. Persons or

(known as the Devitt Committee Report). Similar use of internal and external sources, as well as experimentation, occurred during the Florida Supreme Court's recent consideration of new rules on the access of the electronic media to courtrooms. See *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (1979).

243. See generally NDRPR, *supra* note 3, § 3 (Petition for Adoption, Amendment or Repeal of Procedural Rule, Administrative Rule, or Administrative Order to the ultimate rulemaker). Cf. WASH. REV. CODE ANN. § 2.52.050(2) (Supp. 1984-1985) (Judicial Council, though not itself a final stage judicial rulemaker, receives suggestions from anyone on possible rule changes.).

244. North Dakota has a similar procedure. A petition to the North Dakota Supreme Court for a rule change is followed by either an immediate decision, NDRPR, *supra* note 3, at § 3.5, a hearing, or a standing committee review, *id.* §§ 3.3, 3.5. Cf. WASH. REV. CODE ANN. § 2.52.050(1) (Supp. 1984-1985) (providing for continuous study and surveying of the judicial system).

groups with particular interest in a proposed rule should be sent individualized notice. The opportunity to comment should also depend upon the nature of the proposed rules, and on the strength of the factual premises underlying the proposed changes. Politically sensitive rules require particularly generous opportunities to be heard. Both controversial adjudicative facts, which might typically involve what is occurring within the judicial system, and controversial legislative facts, which might typically involve the existence and scope of the judicial rulemaker's authority, may require a vigorous trial-type proceeding before the judicial rulemaker. Any oral presentation of information (including evidence and opinion) may need to be followed by an opportunity for the rulemaker, as well as others, to ask questions.

Debate need not be restricted to trial-type hearings. The opportunity to submit written comments to the judicial rulemaker regarding the options available on factual issues is another common format. This opportunity should include the ability to respond to the comments upon documents previously submitted to the rulemaker, and upon documents created by the rulemaker itself.

Hearings at which the judicial rulemaker entertains oral presentations should be conducted like traditional legislative committee hearings. These hearings should be transcribed, and the transcripts should be available to all interested parties, including later-stage judicial and nonjudicial rulemakers. Hearings at which oral testimony is received should provide an opportunity for cross-examination by persons other than the judicial rulemakers and its staff members. Cross-examination is sometimes needed even though those appearing before judicial rulemakers are not prone to intentional falsehoods. When the interpretation of certain empirical data is at issue (such as whether the increase in the number of motions for sanctions regarding deficient pleadings means that lawyers have become less careful or otherwise less competent in their drafting of pleadings), cross-examination would permit the most immediate, dramatic and informed confrontations between those with different interpretations of the data. These confrontations should occur during the deliberations on rules which involve a delicate balancing of competing social values, since public sensitivity to the

tensions involved in certain judicial rules would be heightened and public acceptance of forthcoming rules would be facilitated.

Finally, the nature of the debate within a judicial rulemaking procedure should change as the judicial rule under discussion moves from the early stages of consideration to the later stages. In addition, the nature of the debate should be influenced by whether a nonjudicial rulemaker, for instance, the state legislature, is involved in the rulemaking endeavors either before or after involvement by any judicial rulemakers.

During the early stages of judicial rulemaking, the debate should focus on assembling noncontroversial facts. At this stage, the rulemaker should try to resolve all controversial adjudicative facts and current legal facts regarding the rulemaker's authority and the like. During the later stages, the debate should focus on the legislative facts involving issues of "policy and discretion."²⁴⁵ A judicial rulemaking procedure should address questions, such as whether and how to curb instances of lawyer abuse of the civil pleading rules, only after questions regarding the extent of prevailing abuses and the legitimacy of the judicial rulemakers' efforts to curb such abuses have been answered.

Typically, if judicial rulemakers do not possess the exclusive authority to consider and promulgate judicial rules, their conduct will be subject to some form of legislative review. Of course, this review of judicial rulemaking activity provides yet another opportunity for recognition, debate and resolution of factual issues relevant to proposed changes to judicial rules. To the extent that this review is expected to, or usually does, entail an in-depth inquiry, the earlier debate before judicial rulemakers on legislative facts need not be quite as extensive. For example, representative legislators may refrain from very active participation in the judicial rulemaking debate because they have an opportunity to participate when they approve the rules. After all, it is most appropriate for an elected, representative legislature

245. The use of differing standards to review the rulemaking procedure at the later stages of judicial rulemaking should be similar to the standards courts employ to review the facts found by administrative agencies. *Watkins & Beck, Judicial Review of Rulemaking Under the Texas Administrative Procedure and Texas Register Act*, 34 *BAYLOR L. REV.* 1, 34-36 (1982) (reviewing both Texas and Florida law). See *Aetna Life Ins. Co. v. Mitchell*, 101 Wis. 2d 90, 125-27, 303 N.W.2d 639, 655-56 (Wis. 1981) (reviewing Wisconsin law).

to balance competing social values inherent in a particularly sensitive judicial rule.

C. *Resolve the Factual Issues*

Judicial rulemaking procedures necessarily involve an evolutionary process. As discussed, different judicial rulemakers are responsible for focusing on different factual issues during the various stages of the rulemaking process. Certain principles regarding the resolution of factual issues underlie the stages of this evolutionary process.

Early on in judicial rulemaking deliberations, the judicial rulemaker should concentrate on identifying the factual issues which trigger judicial rulemaking activity. These factual issues can be largely adjudicative; the recent changes in the federal civil discovery rules were prompted by perceptions that prevailing discovery tools were "misused and overused" and the subject of "abuse." Or, the factual issues can be legislative; the recent Oklahoma judicial rules on lawyer advertising were triggered by a United States Supreme Court decision declaring earlier judicial rules unconstitutional. In contrast to the federal discovery rules, the need for change in the Oklahoma rules did not emanate from a suggestion of misuse, overuse, or abuse of the old rules. There would have been no change in Oklahoma's rules on lawyer advertising without *Bates v. Arizona State Bar Association*.²⁴⁶

Early identification and resolution of factual issues prompting judicial rulemaking should be followed by examinations, findings, and review of the factual issues underlying possible rule changes. During the early stages of the rulemaking process, most attention should usually be focused on adjudicative factfinding and legislative factfinding involving legal facts, with resolutions always being deemed tentative and thus subject to review during some later stage. These early resolutions should be explicit and should be accompanied by commentary on the evidentiary, policy, and other bases for the rulemakers' preliminary findings. Transcripts and other records should be maintained so that information received and considered by the early-

246. 433 U.S. 350 (1977).

stage rulemaker can be reviewed.²⁴⁷ During the later stages of rulemaking, attention should shift to legislative factfinding involving policy and discretion, with only minimal review of the adjudicative and legal facts which underlie decisions on policy and discretion.

If judicial rulemaking is followed by the involvement of such nonjudicial rulemakers as the U.S. Congress or a representative state legislative body, the nonjudicial rulemakers' involvement should normally be limited to a review of the legislative facts involving policy and discretion.²⁴⁸ Of course, the prospect of nonjudicial rulemaker's involvement may serve to fashion the manner in which later-stage judicial rulemaking occurs.²⁴⁹

VII. Conclusion

Notwithstanding the great diversity in judicial rules and in judicial rulemakers within the many American judicial systems, a consensus has developed that each system ought to strive for

247. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974). In *Portland Cement*, Judge Leventhal stated regarding administrative agency rulemaking: "It is not consonant with the purpose of a rule-making proceeding to promulgate rules . . . on data that, [to a] critical degree, is known only to the agency." *Id.* at 393.

248. Accord Weinstein, *supra* note 1, at 943 (Congress should restrict its review of judicial rules to "consideration of the larger policy issues, rather than involve itself in the details of rulemaking").

249. The foregoing analysis is founded on the view that factual premises underlying judicial rules are recognized, debated, and then finally resolved. However, there are situations in which the factual resolutions leading to rule promulgation come under post-promulgation scrutiny. For example, the data on which the resolutions were made may be released only after rule promulgation. *E.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d at 392-94. In such instances, public process judicial rulemaking must continue after the initial resolutions. See *id.* at 393 (Criticisms of data released by agency after its rulemaking was completed must be considered by the agency, since further agency action was possible.); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (Although a decision two years earlier found that giving arbitration panels exclusive original jurisdiction over all malpractice claims was constitutional, the panels are now declared to be unconstitutional in light of experience.). To alleviate the problems in adjusting new rules based on experience under the rules, some judicial rulemakers promulgate "experimental" rules. See, *e.g.*, Clare Committee Report, *supra* note 242; Gen. Law Sec., 49 U.S.L.W. 2335 (Nov. 18, 1980) (reporting Maryland Court of Appeals' experiment in allowing broadcast coverage of both trial and appellate court proceedings). And consider the proposed changes to the federal civil procedure rule on local rulemaking. *Court Rules*, 98 F.R.D. 337, 370 (1983) (proposed amendment to Fed. R. Civ. P. 83, which would allow local rules on an experimental basis).

greater “public process” in its judicial rulemaking procedure. That consensus has begun to prompt changes, which are leading to more open and accessible judicial rulemaking procedures.

An open and accessible judicial rulemaking process must include procedures by which factual issues underlying judicial rule changes are adequately recognized, fully debated, and rationally resolved. Factual issues include both adjudicative and legislative facts. Because there are differences in these two general categories of facts, the procedures of the rulemaking mechanisms for handling these facts must be varied.

Considerations other than whether the decisions involve an adjudicative or legislative fact should also prompt variations in the procedures for factfinding during judicial rulemaking. One such consideration is the stage within the judicial rulemaking procedure at which the judicial rule and its factual issues reside. Another consideration is the nature of the judicial rulemaking authority: advisory, fettered, or unfettered. Yet another consideration is the extent of the judicial rulemaker’s personal familiarity with the judicial rule under discussion and the nature of the underlying factual issues.

Although the process of factfinding in judicial rulemaking must be tailored to the particular judicial rulemaker, certain guiding principles can be suggested. A court rule or statute should be adopted to facilitate consistent judicial rulemaking procedures and to ensure the necessary sensitivity to the factfinding chores involved in rulemaking. Adjudicative facts and the form of legislative facts characterized as current legal facts must be addressed during the early stages of judicial rulemaking, while legislative facts involving policy and discretion are best left for serious attention in the later stages. Judicial rulemakers should be provided the internal means of gathering information necessary to the resolution of relevant factual issues, although at times they must commission outside assistance. Judicial rulemakers should also seek to have available, uncommissioned, external sources of information. However, they cannot rely exclusively on these sources. The judicial rulemaking process should be open and accessible. Notice and the opportunity to be heard should be provided for those interested in assisting the rulemakers to resolve the controversial facts. The evidentiary record, including public comments, used by the various

rulemakers during their deliberations should be kept on file. Commentary that supports the judicial rulemaker's final factual decisions should be included with the final proposals and rule changes. A rulemaking procedure should include the opportunity for outsiders to petition to initiate a rulemaking inquiry. Finally, factfinding during judicial rulemaking, like factfinding during other forms of lawmaking, should not proceed on the basis of data that is known only to the judicial rulemaker, or on data that is inadequate, or on data that has been misinterpreted by the judicial rulemaker. Outsiders must have an opportunity to correct the misinterpretations. Open and accessible judicial rulemaking procedures must include opportunities for meaningful hearings on the factual premises underlying new judicial rules.