

January 1980

## Public Process and State Judicial Rulemaking

Jeffrey A. Parness

Christopher C. Manthey

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

---

### Recommended Citation

Jeffrey A. Parness and Christopher C. Manthey, *Public Process and State Judicial Rulemaking*, 1 Pace L. Rev. 121 (1980)

DOI: <https://doi.org/10.58948/2331-3528.1678>

Available at: <https://digitalcommons.pace.edu/plr/vol1/iss1/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# Public Process and State Judicial Rulemaking

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

## I. Introduction

Judicial rules are not as visible as statutory enactments, constitutional provisions, or court decisions, but they are often just as important. Rules such as those governing class actions, evidentiary privileges, and attorney conduct, for example, have societal consequences. Frequently, however, the public has little or no opportunity prior to adoption to participate in an evaluation of these rules. In a series of recent works,<sup>1</sup> federal judge Jack B. Weinstein called attention to the lack of "public process"<sup>2</sup> in the rulemaking<sup>3</sup> mechanisms of the federal courts.<sup>4</sup> He suggested certain reforms that would open these mechanisms more fully to public input. The scope of public process in state judicial rulemaking has been discussed very little.<sup>5</sup> Although, as

---

\* B.A., 1970, Colby College; J.D., 1974, Univ. of Chicago. Assistant Professor, University of Akron Law Center.

\*\* B.A., 1969, Hiram College; M.L.S., 1977, Kent State Univ.; J.D., 1980, University of Akron Law Center. Clerk for Hon. William H. Victor, Ohio 9th District Court of Appeals.

1. J. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* (1977) [hereinafter cited as WEINSTEIN]; Weinstein, *Reform of the Federal Rule-making Process*, 63 A.B.A. J. 47 (1977); Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976).

2. As used herein, "public process" means public access to, and participation in, the various judicial rulemaking mechanisms which are responsible in some way for the promulgation and adoption of judicial rules.

3. Following Professor Wright's usage, we choose to employ the term "rulemaking" rather than "rule-making." Wright, Book Review, 9 St. Mary's L.J. 652, 652 n. 3, 656 n. 24 (1978) (review of WEINSTEIN, *supra* note 1).

4. Even before Judge Weinstein discussed judicial rulemaking, Professor Lesnick commented on the lack of public participation in the process. Lesnick, *The Federal Rule-Making Process: A Time for Reexamination*, 61 A.B.A.J. 579 (1975).

5. See, e.g., GRAU, *JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS, AND ACCOUNTABILITY*, 49-66 (1978); Wheeler, *Broadening Participation in the Courts Through*

Judge Weinstein maintains, public process is necessary in judicial rulemaking, not all of his suggestions for the federal judicial system provide appropriate models for state judicial systems.

Judge Weinstein tried to persuade others to "speak out so that the matter [of rulemaking reform] can be thoroughly debated."<sup>6</sup> This article is intended to contribute to the dialogue Judge Weinstein encouraged.<sup>7</sup> First, it will define judicial rules and judicial rulemakers, using a functional rather than formal approach. Next, factors that differentiate federal and state judicial rulemakers will be examined in order to show that the rulemaking methods used in the federal system will not necessarily meet the needs of state judicial rulemakers. Rationales for the need to include public process in judicial rulemaking will be explored. Finally, an adaptable framework which includes public process in state judicial rulemaking will be proposed.

---

*Rulemaking and Administration*, 62 JUDICATURE 281 (1979); Hellman, *The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal, and Policy Questions*, 31 OKLA. L. REV. 509, 523 (1978); Ashman, *Measuring the Judicial Rule-Making Power*, 59 JUDICATURE 215, 221 (1975); Parness, *Public Process and State-Court Rulemaking*, 88 YALE L.J. 1319 (1979).

A consensus exists regarding the need in high court rulemaking for permanent published procedures that include prior publication of the proposed rule, adequate time for public comment, open hearings, and permanent advisory committees. See, e.g., GRAU, *supra* at 52; Grau, *Who Rules the Courts?* 62 JUDICATURE 428 (1979); Wheeler, *supra* at 285-88; Hellman, *supra* at 523-24.

Some states have provided for public input in the rulemaking process. See, e.g., North Dakota's Supreme Court rule governing its own rulemaking, RULE ON PROCEDURAL RULES, ADMINISTRATIVE RULES AND ADMINISTRATIVE ORDERS OF THE NORTH DAKOTA SUPREME COURT (adopted Mar. 15, 1978) [hereinafter cited as N.D. SUP. CT. R.]; North Dakota's Supreme Court rule governing local rulemaking, NORTH DAKOTA RULE ON Local Court PROCEDURAL RULES AND ADMINISTRATIVE RULES (adopted Mar. 15, 1978) [hereinafter cited as N.D. LOCAL CT. R.]; Nevada's Supreme Court rules on adoption of administrative rules, NEVADA RULES ON THE ADMINISTRATIVE DOCKET (adopted June 7, 1978, and amended June 16, 1978) [hereinafter cited as NEV. R. AD. DOCKET]; Michigan's Supreme Court rules on high court and local court rulemaking, MICHIGAN GENERAL COURT RULES, 927 and 933 [hereinafter cited as MICH. GCR]. Regarding the latter, see the new Proposed Michigan Rules, in *Proposed Michigan Rules Special Pamphlet* (West 1978), in which MICH. GCR 933 is omitted, and the letter, suggesting that the omission was inadvertent, to J. Parness from Donald Ubell, Chief Commissioner of the Michigan Supreme Court (dated July 11, 1978).

6. WEINSTEIN, *supra* note 1, at 153.

7. It is hoped that this focus will generate commentary on public process in local rulemaking. See WEINSTEIN, *supra* note 1, at 133-45, 150-52; Flanders, *In Praise of Local Rules*, 62 JUDICATURE 28, 36 (1978); *Proceedings of a Session of the Conference of Metropolitan District Chief Judges on Rules and Rulemaking*, 79 F.R.D. 471, 479-82 (1978).

## II. Judicial Rules and Judicial Rulemakers

### A. *Judicial Rules*

Before examining the extent of public participation in the promulgation and adoption of judicial rules, it is necessary to define the terms to be used in this article. "Judicial rule" traditionally is used in a formal rather than functional sense, including only those promulgations officially labelled as such. This usage is unsatisfactory for the purposes of this article because it restricts discussion to only part of the problem. This article will consider all rules that operate as judicial rules regardless of label—the functional definition.<sup>8</sup>

While the functional definition does not lend itself to precise descriptions, judicial rules may be classified into three categories according to general subject matter. The first category, which might be labelled "conduct of lawsuits," includes the judi-

---

8. Rules governing the operation of the judicial branch of a government are not always adopted by members of that branch. Sometimes legislative bodies are authorized to enact judicial rules. For recent surveys of state judiciaries authorized to promulgate judicial rules, see C. KORBAKES, J. ALPINI & C. GRAU, *JUDICIAL RULEMAKING IN THE STATE COURTS: A COMPENDIUM*, AMERICAN JUDICATURE SOCIETY (1978), and A. ASHMAN & J. ALPINI, *USES OF THE JUDICIAL RULE-MAKING POWER*, AMERICAN JUDICATURE SOCIETY RESEARCH PROJECT (1974).

Rules that govern the operation of the judicial branch of a government often are not designated as either rules or statutes. For example, certain limitations such as procedural due process and prudential aspects of standing under the case or controversy doctrine within the federal constitutional context are inherent in constitutional provisions. Certain other limitations involving no particular constitutional provision but rather the general constitutional scheme are developed during the course of litigation—for example, abstention in the federal judiciary context. It has been suggested that such rules be formalized. See, e.g., Bernstine, *A "Standing" Amendment to the Federal Rules of Civil Procedure*, 1979 WASH. U.L.Q. 501 (proposing a new federal rule of procedure on waiver of standing defenses); ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 49 (1969) (suggesting statutory revision and formalization of abstention rules).

Rulemaking during the course of litigation is criticized, partially because no opportunity for public participation is available. Thus, in *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973), the court noted that when matters of general concern are involved, a rulemaking system open to the public is clearly preferable to policymaking during adjudication:

One of the consequences of the stubborn myth that courts do not make law is the continuing failure to develop a technique whereby all may be heard who are interested in a legal proposition and might contribute to an informed decision. In this respect the rule-making approach is clearly superior.

*Id.* at 371, 307 A.2d at 582.

cial system's rules of practice and procedure.<sup>9</sup> The second category, which might be termed "conduct of practitioners," encompasses rules governing the conduct of lawyers, judges, and others<sup>10</sup> who are operating within the judicial system. The third category, which might be designated "conduct of personnel," encompasses rules prescribing the daily operations of the judicial and nonjudicial staffs of the courts.<sup>11</sup>

Within any of these three categories, a judicial rule serves one or more of the following three purposes: procedural, administrative, or penal. The rules of civil procedure for the federal courts, for example, include a procedural provision defining the purpose and form of pleadings,<sup>12</sup> an administrative provision setting deadlines for the filing of papers,<sup>13</sup> and a penal provision

---

9. States disagree as to whether rules of practice and procedure embody certain judicial rules relating to the conduct of lawsuits. In Missouri, for example, a constitutional provision empowers the state's high court to "establish rules of practice and procedure for all courts;" this power is not extended, however, to "the law relating to evidence." Mo. CONST. art. V, § 5. In Ohio, a constitutional provision recognizes the state supreme court's power to "prescribe rules governing practice and procedure in all courts of the state." OHIO CONST. art. IV, § 5(A). Pursuant to this provision, the high court has promulgated evidence rules; the state legislature approved their implementation in 1980. Walinski & Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W.L. REV. 344, 348 (1978); Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W.L. REV. 16, 18-20 (1978). Two main reasons for the most recent legislative disapproval were that the formulation of evidence rules is a legislative rather than a judicial function and that adoption of rules of evidence does not come within the supreme court's authority to prescribe rules of practice and procedure. Giannelli, *supra*, at 20. Compare 28 U.S.C. § 2072 (1976) (outlining the United States Supreme Court's procedural rulemaking power) with 28 U.S.C. § 2076 (1976) (outlining the United States Supreme Court's evidence rulemaking power).

10. The conduct of nonlawyers is sometimes regulated by rules on the conduct of practitioners. Rules on the unauthorized practice of law often cover nonlawyers. See, e.g., RULE VIII § 2(A) of the SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO [hereinafter cited as Gov. R.] (defining such practice as "the rendering of legal services for others by anyone" not properly registered as an attorney). If lawyers serve as judicial officers, rules on judicial conduct may also cover them. See, e.g., OHIO CODE OF JUDICIAL CONDUCT, 36 Ohio St. 2d at xix, xxxv (1973) (providing that the CODE applies, in part, to mayors who are judges); OHIO REV. CODE § 1905.01 (failing to mandate that mayors who are judges must be admitted to the practice of law).

11. Such rules vary greatly from state to state. See ASHMAN & ALFINI, *supra* note 8. Rules governing judicial staff members cover, *inter alia*, assignment of judges, speedy trial requirements, and pretrial hearings. GRAU, *supra* note 5, at 23-47. Rules governing nonjudicial staff members cover, *inter alia*, statistical reporting, recordkeeping, and calendaring policies. *Id.*

12. FED. R. CIV. P. 8.

13. FED. R. CIV. P. 5(e).

imposing sanctions for noncompliance with discovery orders.<sup>14</sup> State judicial rules regulating attorney conduct include procedural, administrative and penal elements.<sup>15</sup> The traditional rules of court administration also were promulgated to serve all three purposes.<sup>16</sup>

This article will discuss judicial rules in each of the three categories serving any of the three purposes. Discussion also extends to judicial rules that are proposed but not finally promulgated; public process is as important in the rejection of proposed rules as in their adoption. This article will primarily focus upon socially significant judicial rules; the need for public process in the formulation of such judicial rules is quite compelling.

### B. *Judicial Rulemakers*

For the purposes of this article, "judicial rulemaker" will refer to any group which includes at least one judge and which is

---

14. FED. R. CIV. P. 37(b).

15. The OHIO GOV. R., *supra* note 10, an unextraordinary set of high court rules, includes provisions regarding the privacy of each complaint on attorney misconduct and any hearing thereon (Gov. R. V(21)), a permanent docket of each such complaint and any proceedings thereon (Gov. R. V(36)), and the power of the Board of Commissioners on Grievances and Discipline to discipline attorneys via reprimand, suspension or disbarment, based upon the proceedings on an attorney misconduct complaint (Gov. R. V(15), (16)).

16. The Ohio Supreme Court's RULES OF SUPERINTENDENCE FOR MUNICIPAL AND COUNTY COURTS include provisions on the use of videotapes at trial (R. 10), on the filing of reports with the high court (R. 12), and on the imposition of contempt of court orders for improper publication of court proceedings (R. 9).

Judicial rules within procedural, administrative, and penal categories may pertain to one, *e.g.*, RULES OF THE OKLAHOMA COURT OF CRIMINAL APPEALS, RULES OF THE SUPREME COURT OF TENNESSEE (judicial rule of procedure applying to one particular appellate court), some, *e.g.*, MICH. GCR, OHIO CIV. R. (judicial rule of procedure applying to several different types of trial courts), or all of a particular state's courts.

Some sets of judicial rules relate to out-of-court activity—for example, judicial rules governing attorney conduct outside the courtroom as well as in court. In fact, the American Bar Association's CODE OF PROFESSIONAL RESPONSIBILITY, adopted in large part in most states, essentially concerns attorney-client relationships and other attorney conduct outside the courtroom, covering such topics as maintenance of a client's assets, solicitation of clients, and attorney advertising.

Under unauthorized practice of law provisions, judicial rules may even regulate the out-of-court activity of nonlawyers. See Cuyahoga County Bar Ass'n v. Gold Shield, Inc., 52 Ohio Misc. 105, 369 N.E.2d 1232 (C.P. Cuyahoga 1975); Bar Association of Greater Cleveland v. Brunson, 37 Ohio Misc. 61, 304 N.E.2d 250 (C.P. Cuyahoga 1973) (wherein enjoinder of activities involving a corporation and laymen was sought).

responsible for the making of judicial rules. Judicial rulemakers include not only courts, but also other judicially-staffed bodies, whether or not comprised exclusively of judges.<sup>17</sup>

The focus here will be on the entire rulemaking process. Previous studies and commentaries have often assumed, or given the impression, that any particular set of judicial rules was effected by a single judicial rulemaker. Thus, few writers have examined the processes by which judicial rules proceed through various intermediate levels of rulemakers to the ultimate rulemaker.<sup>18</sup> In most states, several judicial rulemaking bodies share the responsibility for most judicial rules. As in federal judicial rulemaking, state judicial rulemaking hierarchies often include an advisory committee, a standing committee, and a court.<sup>19</sup> Different rulemakers may be responsible for different kinds of rules or for different stages in the rulemaking process. The Ohio Supreme Court, for example, has judicial rulemaking responsibilities in each of the three major categories of judicial rules,<sup>20</sup> but participates in the final stage of rulemaking only with respect to rules in the "conduct of personnel" and "conduct of practitioners" categories.<sup>21</sup>

The character of a judicial rulemaker is shaped by the de-

---

17. The most familiar type of judicially-staffed rulemaking body is a state's highest court. Other types of judicial rulemakers include bodies comprised of judges from several courts, *see, e.g.*, N.Y. JUD. LAW § 214 (McKinney Supp. 1980) (judicial conference), and bodies only partly comprised of judges. *See, e.g.*, OR. REV. STAT. § 1.730 (1979) (Council on Court Procedures, composed of ten judges from various courts, twelve members of the state bar, and one public member).

18. Judge Weinstein and Professor Lesnick have focused on the intermediate, as well as the final, rulemaker in the federal judicial system. *See* notes 1-4 and accompanying text *supra*. Professors Korbakes, Alfini and Grau have completed the most extensive study to date of intermediate rulemakers in state judicial systems. KORBAKES, ALFINI & GRAU, *supra* note 8. That study proceeds on the implicit assumption that the intermediate rulemakers, or the "rulemaking process," is similar for varying types of rules. This assumption is not always valid. Compare the discussion of the Ohio Supreme Court's rulemaking process in *id.* with that in Manthey & Parness, *Public Process and Ohio Supreme Court Rulemaking*, 28 CLEV. ST. L. REV. 249 (1979).

19. In Minnesota, the high court, as rulemaker, is assisted by an advisory committee as well as a judicial council. MINN. STAT. ANN. §§ 480.052, 483.01, 480.053 (1971). For a state-by-state review, *see* KORBAKES, ALFINI & GRAU, *supra* note 8.

20. OHIO CONST. art. IV, § 5(A)-(C).

21. Compare OHIO CONST. art. IV, § 5(A) and (B) (no legislative review of the court's superintendence or practice of law rules) with OHIO CONST. art. IV, § 5(B) (legislative review of the court's procedural rules).

gree of independence or authority with which it is vested. Judge Weinstein distinguished between "fettered" and "unfettered" rulemaking.<sup>22</sup> A fettered judicial rulemaker does not have the final authority to promulgate rules, but rather expects final action or inaction by a rulemaker vested with that power. In the federal system, for example, rules adopted by the Supreme Court do not become effective immediately, but only upon congressional approval.<sup>23</sup> While states provide for similar legislative review,<sup>24</sup> the nature of such review may vary significantly; some state rulemaking systems permit a legislature to veto a high court rule by a simple majority vote<sup>25</sup> while others require a two-thirds vote.<sup>26</sup> Further, such legislative veto power is sometimes coupled with a power to amend proposed rules.<sup>27</sup>

Unfettered judicial rulemaking authority contemplates freedom from subsequent review. This form of authority is often found where a constitution is the source of rulemaking authority. In Colorado, the state supreme court has the power to "make and promulgate rules governing the administration of all courts [and] . . . rules governing practice and procedure in civil and criminal cases."<sup>28</sup> Some states provide by statute for unhampered judicial authority.<sup>29</sup> This power is founded upon the traditional theory that the legislature and judiciary are separate but equal branches of government.<sup>30</sup>

---

22. WEINSTEIN, *supra* note 1, at 83.

23. 28 U.S.C. §§ 2072-2076 (1976); 18 U.S.C. § 3771 (1976).

24. J. PARNES & C. KORBAGES, *A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES* (1973).

25. *See, e.g.*, MD. CONST. art. IV, § 18; OHIO CONST. art. IV, § 5(B).

26. *See, e.g.*, ALASKA CONST. art. IV, § 15; FLA. CONST. art. V, § 2(a).

27. *See* Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO BAR NOS. 727, 729 (1970) (indicating that the Ohio Supreme Court accepted certain suggestions of a joint legislative committee after submission of the initial set of proposed civil rules).

28. COLO. CONST. art. VI, § 21.

29. *See, e.g.*, N.H. REV. STAT. ANN. § 490.4 (1968) (giving the Supreme Court the authority to approve rules of the court); R.I. GEN. LAWS ANN. § 8-6-2 (Supp. 1980) (giving all state courts rulemaking power which can supersede conflicting statutes).

30. Some state high court rulemaking is subject to possible legislative review and veto. In states in which such powers are not effectively exercised, however, the tradition of legislative deference can itself be considered a source of unfettered rulemaking authority.



### III. Factors Distinguishing Judicial Rulemakers

Different forms and degrees of public process in judicial rulemaking are justified by the significant differences between federal and state judicial rulemakers and among state judicial rulemakers.<sup>31</sup>

One difference between federal and state judicial rulemakers is the degree of autonomy of the judicial rulemaker. The rulemaking authority of the United States Supreme Court is subject to legislative overview,<sup>32</sup> a limitation not imposed on

---

31. On federal judicial rulemaking, Professor Lesnick has said, "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. . . ." Lesnick, *supra* note 4, at 580. The several studies of state judicial rulemaking have been based, in part, upon answers to questionnaires distributed to judicial officials responsible for developing judicial rules. See PARNES & KORBAGES, *supra* note 24, at 1; KORBAGES, ALFINI & GRAU, *supra* note 8, at vii. See also ASHMAN & ALFINI, *supra* note 8, at i-ii.

These differences have not been adequately addressed, possibly because of traditional concern with the authority to be given ultimate rulemaking responsibility rather than with how such power should be used. Other reasons for this inattention may be Judge Weinstein's focus on federal judicial rulemaking or the assumption that similar public process should apply to federal and state judicial rulemaking.

Historically, the concern has centered on the appropriate roles of the legislature and of the courts in promulgating judicial rules. The American Judicature Society's model judicial article has undergone several permutations over the years, reflecting the various positions taken in this debate. In 1920, the article recognized the exclusive power of a judicial council to make procedural rules. *Model Judiciary Article*, 3 JUDICATURE 132, § 15 at 139 (1920). By 1942, this position was reversed, and the legislature was given the power to "repeal, alter or supplement any rule or procedure" put forth by the judicial council. *Model Judiciary Article and Comment Thereon*, 26 JUDICATURE 51, § 607 at 58 (1942). More recently, the article has given the rulemaking power to the state's highest court. The extent of that power is somewhat unclear; the legislature's power is not mentioned. *Text of the Model State Judicial Article*, 47 JUDICATURE 8, § 9 at 12 (1963). Not only is the proper authority question continually debated, but the actual power of the existing rulemaking bodies in the states is subject to some debate. Commentators disagree as to the proper scope of a state high court's rulemaking power which is not subject to final legislative review. See Parness, *supra* note 5, at 1319-20; WEINSTEIN, *supra* note 1, at 77-87; Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951); GRAU, *supra* note 5, at 7-22; Note, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. (Nw. U.L. REV.) 276 (1928).

32. 28 U.S.C. §§ 2072-2076 (1976). The federal judiciary, under article III of the Constitution, possesses far less constitutionally-mandated adjudicatory authority than do many state judiciaries under state constitutions. Compare U.S. CONST. art. III with ILL. CONST. art. VI, §§ 1, 4, 6 and 9 (the judiciary's existence and jurisdiction). The sole possible locus of inherent rulemaking authority in the federal system seems to be the provision in article III, § 2, of the Constitution regarding the Supreme Court's original jurisdiction. See Parness, *supra* note 5, at 1319 n. 4.

many state high courts.<sup>33</sup> In states which do subject their high court rulemaking to legislative overview, such overviews often differ in scope and subject matter from those under which the federal high court operates. While a legislative veto of the procedural rulemaking of the United States Supreme Court<sup>34</sup> or the Ohio Supreme Court<sup>35</sup> requires only a majority vote of the particular legislative body, a legislative veto of Florida Supreme Court rulemaking requires a two-thirds vote.<sup>36</sup> Unlike its procedural rules, the Ohio Supreme Court's rules of professional responsibility and of lower court supervision are not subject to legislative review.<sup>37</sup>

A second difference between rulemakers is the subject matter of the rules. Some subjects, such as civil and criminal procedure, are common to both state and federal judicial rulemaking, while others are exclusively in the province of one type of jurisdiction or another. The rulemaking authority of the United States Supreme Court, for example, encompasses admiralty<sup>38</sup> and bankruptcy,<sup>39</sup> unlikely subjects for state judicial rulemaking.<sup>40</sup> Similarly, state judicial rulemaking authority often extends to nonfederal subjects such as state court boundaries,<sup>41</sup> state judicial conduct,<sup>42</sup> and state court venue.<sup>43</sup>

---

For further analysis of federal court judicial power, see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-31 (1816); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1584 (1833).

33. OHIO CONST. art. IV, § 5(A)(1) provides that the supreme court has general superintendence over all courts in the state and that such general power is to be exercised by the chief justice in accordance with rules promulgated by the supreme court. No provision is made for legislative review of the court's superintendence rules, although legislative review is constitutionally mandated if the Ohio Supreme Court promulgates rules of pleading and practice. OHIO CONST. art. IV, § 5(B). Examples of other state courts with rulemaking authority not subject to legislative review may be found in Parness, *supra* note 5, at 1320 n. 7 and KORBAKES, ALFINI & GRAU, *supra* note 8.

34. 28 U.S.C. § 2072 (1976).

35. OHIO CONST. art. IV, § 5(B).

36. FLA. CONST. art. V, § 2(A).

37. OHIO CONST. art. IV, §§ 5(A), 5(C).

38. 28 U.S.C. § 2073 (1976).

39. 28 U.S.C. § 2075 (1976).

40. The federal district courts have exclusive original jurisdiction over admiralty and bankruptcy cases. 28 U.S.C. §§ 1333, 1334 (1976).

41. VT. STAT. ANN. tit. 4, § 436 (1972); tit. 12 App. VIII, A.O. 2 (Supp. 1980).

42. OHIO CODE OF JUDICIAL CONDUCT (1979).

43. Ohio R. Civ. P. 3, OHIO REV. CODE ANN. (Page 1971).

Different judicial rulemakers need different forms of public process. Public involvement in judicial rulemaking procedures subject to legislative overview may be unnecessary, particularly if the legislators scrutinize the judicially proposed rules. Similarly, public process seems a less necessary ingredient in the promulgation of rules on court recordkeeping than rules on attorney or judicial conduct.

#### IV. Rationales for Increased Public Process

Public process in judicial rulemaking is desirable for several reasons. As a matter of political legitimacy,<sup>44</sup> our democratic system requires that the public have a voice in governmental actions which affect it. When a court or other body makes judicial rules, it often acts in a legislative rather than an adjudicatory capacity;<sup>45</sup> rules direct conduct in much the same way that statutes do. Therefore, judicial rulemakers, just as legislative<sup>46</sup> and quasi-legislative<sup>47</sup> bodies, should allow some measure of public

---

44. Professor Lesnick notes that the present federal rulemaking structure fails to meet "the expectations of our constitutional traditions." Lesnick, *supra* note 4, at 582.

45. WEINSTEIN, *supra* note 1, at 4-8; Wheeler, *supra* note 5, at 285; Lesnick, *supra* note 4, at 580; Busik v. Levine, 63 N.J. 351, 371, 307 A.2d 571, 582 (1973) (Weintraub, C.J.); *id.* at 375, 307 A.2d at 584 (Conford, dissenting); *id.* at 386, 307 A.2d at 589 (Mountain, dissenting).

46. In the Ohio General Assembly, for example, rules have been adopted governing House and Senate committee meetings and committee procedures. Such rules provide for prior notice, opportunity to be heard, and recordkeeping. See Rules 31-39 of the Ohio House of Representatives, reprinted in HOUSE JOURNAL, Wednesday, January 10, 1979, at 53-54. See also OHIO LEGISLATIVE SERVICE COMMISSION, A GUIDEBOOK FOR OHIO LEGISLATORS 50-55 (1977).

47. The benefits of public participation in federal administrative agency rulemaking have long been recognized. The Administrative Procedure Act, 5 U.S.C. § 501 *et. seq.*, requires that agencies give public notice of most rulemaking activities and allow interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c). In recent years, increased opportunity for the public to participate in federal agency rulemaking has been provided. Several recent statutes have significantly expanded the opportunity to present oral testimony at agency rulemaking proceedings. See, e.g., 15 U.S.C.A. § 57a(c) (West Supp. 1980) (Federal Trade Commission); 15 U.S.C.A. § 78f(e)(4)(A)(ii) (West. Supp. 1980) (Securities and Exchange Commission); 15 U.S.C.A. § 2058(a)(2) (West Supp. 1980) (Consumer Product Safety Commission); 15 U.S.C.A. § 2605(c)(3)(B) (West Supp. 1980) (Environmental Protection Agency). A proposal currently pending before the Congress provides that "to ensure a full and balanced discussion of the desirability of proposed agency action and its alternatives, each agency should maximize the opportunity for timely and meaningful public comment in the deci-

access. In fact, the need for public process in judicial rulemaking may be greater, since rulemakers, unlike legislators, are often appointed rather than elected,<sup>48</sup> and, unlike administrators, are often unrestrained by legislative review.<sup>49</sup>

Judicial rules may have "a substantive effect on sensitive issues of social policy"<sup>50</sup> in addition to a secondary impact that derives from "strictly technical questions of procedure."<sup>51</sup> As noted earlier, judicial rules on class actions, evidentiary privileges, and attorney advertising affect the public as well as members of the legal profession. In many states, however, the public lacks the same opportunity to speak out on these issues as is afforded if these subjects are governed by legislation.<sup>52</sup>

Moreover, practical benefits accrue from allowing greater public access to judicial rulemaking mechanisms. If diverse viewpoints are heard, the end result is likely to be enhanced. Legislative committees and executive agencies commonly invite knowledgeable individuals to express their views on pending legislation or rules.<sup>53</sup> Judicial rulemakers could also profit from

---

sionmaking process." Reform of Federal Regulation Act of 1979, S. 262, 96th Cong., 1st Sess. § 101(3) (1979).

48. State supreme court judges are often appointed, not elected. Some states have implemented merit selection plans, while other states provide for some high court judges to be gubernatorially appointed. Non-judicial members of judicial rulemaking bodies, such as law school professors who serve on a high court's rules advisory committee, are not elected either. More often than not, such members are appointed for their expertise in a certain subject or as representatives of the bench and bar, but not as representatives of the public. An extreme example of unrepresentative judicial rulemaking is found in the Article III federal judicial system: judges are appointed for life and the public has no direct voice in such appointments.

49. Administrative agency rulemaking is subject to varying forms of legislative review. Agency rules must fall within the scope of the rulemaking authority conferred by the legislature; such authority can be diminished at any time. Given the rulemaker's statutory authority, questions regarding the propriety of rules can usually be raised on judicial review. See, e.g., 5 U.S.C. § 702 (1976).

50. Wright, *supra* note 3, at 656. See also Wheeler, *supra* note 5, at 288.

51. Wright, *supra* note 3, at 656.

52. In some jurisdictions, areas of significant social policy may be governed by both judicial rule and legislative enactment. Compare Fed. R. Civ. P. 23 (class actions) with recent calls for legislative change in the class action area. See Meador, *Proposed Revision of Class Damage Procedures*, 65 A.B.A.J. 48 (1979).

53. Federal legislative committees commonly publish transcripts of these proceedings. While state legislative committees also often hold hearings, a printed record is usually not readily available. Federal administrative agencies hold hearings for both formal, 5 U.S.C.A. § 554 (West Supp. 1980), and informal, 5 U.S.C.A. § 553 (West 1977), rulemaking. See also note 47 *supra*.

the expertise and insights of others, enabling rulemakers to spot and correct deficiencies.

Even if the public does not choose to participate in judicial rulemaking,<sup>54</sup> the opportunity to do so is still important, promoting public acceptance of any action taken and legitimatizing the rulemaking mechanism as well as the rules themselves.<sup>55</sup> If no opportunity for public participation is available, dissatisfaction with otherwise meritorious rules may result in cries against "highly secretive" proceedings.<sup>56</sup>

### V. A Framework for Public Process in State Judicial Rulemaking

Initially, the scope of public process in state judicial rulemaking should be governed by the extent to which the judicial rulemakers' decisions are preceded by and/or followed by

---

54. This assumes that some individuals will be sufficiently interested to make their views known. The validity of this assumption has been questioned. See, e.g., Hazard, Book Review, 87 YALE L.J. 1284, 1286-87 (1978); Walinski & Abramoff, *supra* note 9, at 348 n. 21 (1978); Wright, *supra* note 3, at 654.

55. Parness, *supra* note 5, at 1323 n. 32 (suggesting that increased legitimacy in the rulemaking process derives *per se* from the opportunity for public participation regardless of whether public contributions are likely to be viable or forthcoming at all).

56. Professor Hellman criticized the Oklahoma Supreme Court and a special bar association committee for the "highly secretive" way in which Oklahoma's recent rules on attorney advertising were adopted. Hellman, *supra* note 5, at 522. The court had adopted these rules, without substantial change, from proposed rules submitted by the state bar association; there is no indication whether the court had solicited the proposals. The bar association's proposals were largely based on proposals prepared by one of its special committees. Professor Hellman noted the lack of publicly available information on the bar committee membership, the times and places of bar committee meetings, the proposals considered, the final proposals adopted by the committee, and the modifications to the committee's proposals made by the bar association's Board of Governors. Professor Hellman also noted that the text of the bar association's proposals was not released prior to adoption, even to members of the bar association. Finally, he pointed out that the court's consideration of the proposals took place during a meeting between the court and an uncertain number of bar association officials, a meeting which was not announced, transcribed, or open to the public. *Id.* at 517-19. Professor Hellman also criticized the new rules on their merits.

Other state high courts have been similarly criticized regarding their modes of judicial rulemaking. A Philadelphia newspaper recently accused the Pennsylvania Supreme Court of secretiveness and unaccountability in its rulemaking activities, labeling the court "The Supreme Disgrace." *The Supreme Disgrace: An Editorial Investigation of Pennsylvania's Supreme Court*, Philadelphia Inquirer, Apr. 16, 23, 1978 (editorial), quoted in GRAU, *supra* note 5, at 50. Regarding the Supreme Court of Ohio, see Parness, *supra* note 5, at 1324 n. 35.

the deliberations of other rulemaking bodies. The accessibility of the public to these nonjudicial rulemakers will affect the degree of public process necessary in the judicial rulemaking phase of the procedure.

Once it is determined that public process should be incorporated into the rulemaking procedure, the next inquiry must address the characteristics of such public participation. Ideally, all rulemaking mechanisms should: be known to the public; provide adequate notice and opportunity to be heard; require that a reasoned basis be part of the record, at least for most final rules; be permanent to the extent possible; and provide the opportunity for public initiative.

#### A. *Known Rulemaking Mechanisms*

Perhaps the most important characteristic of an open rulemaking system is public knowledge of the procedures used to formulate judicial rules.<sup>57</sup> Public knowledge requires that an expressly defined rulemaking procedure be established. The right to be heard is of little value if knowledge of the right or the manner by which to exercise that right is lacking. At present, only an exhaustive survey of a state's constitutional, statutory, and judicial rule provisions, along with judicial interpretations thereof, will reveal state judicial rulemaking mechanisms.<sup>58</sup> Even such an exhaustive survey often fails to yield information on the traditional operations of the various judicial rulemakers.<sup>59</sup> For example, high court utilization of advisory committees to assist

---

57. There is substantial agreement on this point. See, e.g., WEINSTEIN, *supra* note 1, at 6-7; GRAU, *supra* note 5, at 52; Wheeler, *supra* note 5, at 285; Lesnick, *supra* note 4, at 580. As Professor Lesnick states, the publication of the procedures by which a rulemaker considers rules not only "would enhance the awareness of interested persons and thereby facilitate their participation," but would also require the rulemaker to "face explicitly the question whether its procedures now provide adequate means for obtaining a broad range of input." *Id.*

58. For descriptions of state judicial rulemaking mechanisms containing such surveys, see PARNES & KORBAGES, *supra* note 24, and KORBAGES, ALFINI & GRAU, *supra* note 8.

59. Traditionally, the Ohio Supreme Court has used advisory committees on a regular, although *ad hoc*, basis. Corrigan, *supra* note 27, at 727 (civil rules); O'Neill, *Symposium: The Ohio Rules of Evidence*, 6 CAP. L. REV. 515 (1977) (evidence rules). When such committees have been appointed, descriptions of their delegated responsibilities have been withheld from the public or given only limited circulation.

in judicial rulemaking responsibilities is often discretionary and unwritten. Lack of information on the formation, composition, and procedures of advisory committees renders meaningless any right to be heard before them. Even if the use of advisory committees is to remain discretionary with a high court, the decision to utilize such a committee should trigger a system to provide adequate public knowledge and input.<sup>60</sup> In other words, general procedures for judicial rulemaking should be fixed.

Knowledge regarding a judicial rulemaker's established manner of proposing, pondering, and promulgating judicial rules can be transmitted through a constitutional<sup>61</sup> or statutory provision,<sup>62</sup> or through a rulemaker's own rule, standing order, or administrative order.<sup>63</sup> In many instances, the simplest way to convey the bulk of such knowledge is through a judicial rule on rulemaking. North Dakota and Nevada recently adopted such rules. North Dakota set up two parallel judicial rulemaking mechanisms, one covering rules of statewide applicability<sup>64</sup> and the other covering local rules.<sup>65</sup> They seem to have been intended for use in rulemaking in the "conduct of lawsuit" and "conduct of personnel" categories.<sup>66</sup> Nevada's rule on rulemaking differs from North Dakota's in that Nevada's is limited to the promulgation of administrative rules by the high court.<sup>67</sup>

## B. *Notice and Opportunity to be Heard*

### 1. *Notice*

Adequate notice of judicial rulemaking activities constitutes another integral part of an open rulemaking system. To ensure a meaningful opportunity to participate, notice must be given far enough in advance to allow those desiring to be heard sufficient

---

60. See note 5 *supra*.

61. CAL. CONST. art. VI, § 1(a) (creating a Judicial Council with the authority to adopt rules of court administration, practice, and procedure).

62. OR. REV. STAT. §§ 1.730-1.750 (1979) (creating a Council on Court Procedures with certain rulemaking authority).

63. N.D. SUP. CT. R., *supra* note 5; NEV. R. AD. DOCKET, *supra* note 5.

64. N.D. SUP. CT. R., *supra* note 5.

65. N.D. LOCAL CT. R., *supra* note 5.

66. N.D. SUP. CT. R., *supra* note 5; N.D. LOCAL CT. R., *supra* note 5, at § 2.

67. NEV. R. AD. DOCKET, *supra* note 5.

time to prepare. In all but exceptional circumstances,<sup>68</sup> a minimum time period should be set between the notice of an advisory body's public hearing and the date of such a hearing. A period of two weeks would probably provide sufficient notice,<sup>69</sup> although such a period may be inadequate for hearings with live testimony and cross-examination.

Proper notice should include sufficient information to permit informed judgments on the proposal's merits and on the value of participation through debate. At present, most state judicial rulemakers merely circulate the texts of proposals.<sup>70</sup> North Dakota, however, has taken a different, but worthwhile, step: in its high court rule on rulemaking, notice of proposed changes by the advisory body to its highest court may include a recitation of the rationale behind the proposal and "supporting documentation."<sup>71</sup>

Any notice of rulemaking activity should be designed to reach any who might be interested in the proposal under consideration. Some state judicial rulemaking mechanisms have, for example, singled out the following to receive individual notice: the state bar association<sup>72</sup> and/or its individual members,<sup>73</sup> the state legislature,<sup>74</sup> and the press.<sup>75</sup> Various methods of notifica-

---

68. Provisions should be made for emergencies requiring immediate implementation of a judicial rule. *See, e.g.*, N.D. SUP. CT. R., *supra* note 5, at § 6.1; N.D. LOCAL CT. R., *supra* note 5, at § 6.1; MD. RULES PROC., Rule 4(c) (1977); MICH. GCR 933, *supra* note 5.

69. In established state judicial rulemaking mechanisms, at least two weeks are usually allowed. The statutes, however, vary widely. Mississippi requires notice, but does not specify any time period. MISS. CODE ANN. § 9-3-69 (Supp. 1979). Oregon requires two weeks notice, but only to members of the state bar. OR. REV. STAT. § 1.730(3)(b) (1979). North Dakota allows thirty days notice to the public as well as to the bar. N.D. SUP. CT. R., *supra* note 5, at § 7.1; N.D. LOCAL CT. R., *supra* note 5 at § 7.1. *See also* MD. RULES PROC., Rule 4(c). Wisconsin allows thirty to sixty days. WIS. STAT. ANN. § 751.12 (West 1979). New Jersey has a variable notice period of up to nine months for evidence rules, N.J. STAT. ANN. § 2A: 84A-35, -36 (West 1976), while Michigan has a "reasonable notice" requirement for its GENERAL COURT RULES. MICH. GCR 933, *supra* note 5.

70. OR. REV. STAT. § 1.730(3)(c) (1979).

71. N.D. SUP. CT. R., *supra* note 5, at §§ 3.2, 4.2 and 7.1 ("notice of the matter").

72. *See, e.g.*, MICH. GCR 933, *supra* note 5; N.D. SUP. CT. R., *supra* note 5, at § 7.1; MINN. STAT. ANN. § 480.054 (West 1971).

73. *See, e.g.*, OR. REV. STAT. § 1.730(3)(b) (1979) (distribution prior to final judicial rulemaker action); ARIZ. REV. STAT. ANN. § 12-109(B), (C) (1956) (distribution after final judicial rulemaker action but prior to date of effectiveness).

74. *See, e.g.*, N.J. STAT. ANN. § 2A: 84A-35 (West 1976).

75. N.D. SUP. CT. R., *supra* note 5, at § 7.1.



tion may be required. In some instances, a general notice to the public, through publication in newspapers or official state governmental newsletters, might provide adequate notification. If the general public is being invited to participate, publication of a notice in the state bar association journal, the apparent sole standard source of notice in some states,<sup>76</sup> would be insufficient. Press releases, public service announcements on radio and TV, direct mailings to those in affected locales, and direct solicitations of views from particular groups,<sup>77</sup> would be appropriate means of informing the public. Additional audiences would be reached by the systematic furnishing of notice to lower courts, law schools, and public libraries for posting.

## 2. *Opportunity to be heard*

The opportunity to be heard has three important facets: the categories of persons eligible to comment, the appropriate stage for input, and the manner of presentation. The categories of persons permitted to comment on proposed rules, as well as the manner of presentation of these views, should depend upon the type of rule proposed and its particular stage in the rulemaking process. If a proposed rule might have a significant impact on only one particular group, opportunity to comment should be afforded to that group alone.<sup>78</sup> If the rule concerns class actions, comment by any member of the public should be allowed. If, however, the rule describes the proper format of briefs, comment should be restricted to members of the bench or bar.

Often, several judicial rulemaking bodies consider a proposed rule at different points in time.<sup>79</sup> No person should be

---

76. Hellman, *supra* note 5, at 518 n. 62. See letter to J. Parness, dated July 6, 1978, from Thomas L. Startzman, Clerk of the Ohio Supreme Court, regarding that court's adoption of a rule on attorney advertising.

77. *Recommendations of the Administrative Conference of the United States*, 1 C.F.R. § 305.71-6(E) (1980).

78. If, for example, a proposed judicial rule would impose on the clerks of a court the responsibility for forwarding to a central administrative office monthly reports of their courts' activities during that month, such clerks should be afforded a special opportunity to speak, and to speak by oral, rather than simply written, comments.

79. Should everyone possessing a right to be heard be able to exercise that right during every stage within the rulemaking process? The answer, which is clearly "no," is best explained by reviewing one aspect of federal judicial rulemaking. Advisory Committees to Standing Committees of the Federal Judicial Conference initially research and

given an absolute right to be heard before each of the bodies

---

draft proposed rule changes to alleviate recognized problems within the federal judiciary. See, e.g., *Suggested Interim Bankruptcy Rules*, 82 F.R.D. 487, 487 (1979) (Advisory Committee on Bankruptcy Rules' draft of suggested rules to meet changes mandated by recent congressional enactment of new bankruptcy law). See also *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, Rules Governing Section 2255 Procedures for the United States District Courts, and Federal Rules of Evidence and Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 507-657 (1978) [hereinafter cited as *Proposed Amendments*]. The Advisory Committees forward drafts to the Judicial Conference, WEINSTEIN, *supra* note 1, at 7; rules proposed by the Advisory Committee may become local rules of court without review by the Judicial Conference, its Standing Committee on Rules of Practice and Procedure, the United States Supreme Court, or the Congress. *Suggested Interim Bankruptcy Rules*, 82 F.R.D. 487, 488 (1979) (Advisory Committee Chairman encourages the adoption of the interim rules as local rules).

This procedure of submitting the proposed rules to the Judicial Conference permits public commentary and draft alteration along the way. *Id.* at 488 (Advisory Committee solicits comments); *Proposed Amendments*, *supra* at 510-11 (1978) (Standing Committee solicits comments). See also Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. BAR J. 225, 225-27 (1973) (development within the federal judicial rulemaking system of the federal rules of evidence); WEINSTEIN, *supra* note 1, at 71-73 (same).

When the Judicial Conference is satisfied, it sends proposed changes to the United States Supreme Court. The Court further scrutinizes and sometimes changes the drafts. Upon Supreme Court approval of the drafts, Congress and the appropriate committees consider and sometimes hold hearings on the drafts. Proposed rule changes, along with whatever legislative committee alterations were made, then go to the full House and Senate, which may further debate and amend the drafts before final adoption.

Congressional review of the federal judicial rulemaker's proposals perhaps reached its zenith with the submission of the Federal Rules of Evidence to Congress, presumably pursuant to 28 U.S.C. § 2072. Such extensive review was justified by Judge Weinstein on the "ground that Congress was providing a public forum for debate." WEINSTEIN, *supra* note 1, at 75.

Congress is not a *judicial* rulemaker. See note 47 and accompanying text *supra*. It is, however, a rulemaker and is often guided in its actions by lawyers. Professor Hazard has noted:

The changes made by the House Judiciary Committee in the *Federal Rules of Evidence* exemplify the disproportionate influence that lawyer-legislators often have on procedural rules emanating from the legislature. The lawyer-legislators have influence as legislators because they are in the legislature; they have influence as lawyers because they present themselves to their fellow members in the legislature as professional experts in "lawyer's law," as the law of procedure may aptly be classified. The lawyer-legislators cannot be drawn into technical debate by their professional peers, nor into debate over policy by their political peers. In my own experience, moreover, lawyer-legislators occasionally exhibit deep resentment at the superior professional stature of the elite of the bar found on the drafting committees. As a result, they sometimes allow themselves to legislate their professional grudges. In a somewhat parallel fashion, the lawyer-legislators when confronted with questions of procedure often project the opinions of that part of

during the various stages of rulemaking. Conferring such a right would not only be potentially burdensome and time consuming for the rulemakers, but would undoubtedly encourage repetitious comments by the same speakers. As long as an adequate opportunity for public involvement is provided at the most appropriate point or points in the process, the demands of political legitimacy are satisfied.

The manner of presentation of public views will depend upon the subject of the rule, the stage in the rulemaking process, and the purpose of the communication. Public communication can be designed to inform the rulemaker of necessary facts or to convey legal conclusions, as well as to state political or philosophical positions.

Forms of public participation permitted during judicial rulemaking include submission of written comments,<sup>80</sup> presentation of oral testimony, with or without right of cross-examination,<sup>81</sup> and introduction of documentary or other tangible evidence. Full cross-examination should be reserved for proposed

---

the bar that is seldom in court and that therefore wants a system where relative amateurs can maintain sway. This is an interest that deserves some protection and is one to which Rules committees, being composed of litigation specialists, are often inattentive. Yet on the whole the amateur interest is given excessive weight when the legislature has a strong, direct influence on the Rulemaking process. At any rate, it seems fair to say that it is not the superior expertise of the judiciary in such matters but rather these political circumstances that have been the real impetus for removing procedural Rulemaking from the legislature.

Hazard, *supra* note 54, at 1292-93.

80. In Texas, the supreme court may only implement rules governing the legal profession after the rules have been approved by a majority vote in an election conducted by mail among the members of the state bar association. TEX. REV. CIV. STAT. ANN. art. 320a-1, § 4 (Vernon 1973). For more traditional types of written comments, see N.D. SUP. CT. R., *supra* note 5, at § 4.1; 41 OHIO BAR NOS. 5, 45, 49 (1968); 42 OHIO BAR NOS. 4, 7, 10 (1969) (soliciting comments on Ohio Civil Rules).

81. Oral testimony is increasingly a part of federal administrative agency rulemaking. See note 47 *supra*. In many state judicial rulemaking systems, particular rulemakers are given the option of conducting oral hearings rather than simply receiving written comments. See, e.g., NEV. R. AD. DOCKET, *supra* note 5, at § 7.2 ("the study committee may hold hearings or solicit input as it sees fit"); WYO. STAT. § 5-2-117 (1977) (the supreme court's advisory committee "shall hold hearings upon proposed rules in such manner . . . as the supreme court prescribes"); MISS. CODE ANN. § 9-3-69 (Supp. 1979) (the high court's advisory committee "shall publicize the terms and provisions of the proposed rules and shall receive and consider suggestions . . . for their improvement"); MICH. GCR 933, *supra* note 5 (supreme court may adopt new rules only after "giving reasonable notice . . . of the manner and means by which comments thereon may be made").

rules with the potential for great social impact and for those rules which will be based, in part, upon the rulemaker's factual findings.<sup>82</sup> Cross-examination is very time-consuming; therefore, the rulemaker should be permitted to restrict cross-examination whenever necessary.<sup>83</sup>

It may be possible for the same speaker to communicate ideas in several different forms and to several different rulemakers. Thus, at an initial stage in the rulemaking process, it would be appropriate to allow presentation of oral testimony and tangible evidence relating to relevant questions of fact. At the final stage, however, submission of written comments should be sufficient. Presumably, public input in other forms has been provided at earlier stages in the process.<sup>84</sup>

### C. *Reasoned Basis for Judicial Rulemaking*

A reasoned basis for decisions constitutes another important aspect of state judicial rulemaking. In order to aid public and professional understanding and the implementation of adopted rules, as well as to promote a more thorough consideration of alternatives,<sup>85</sup> a judicial rulemaker should state its reasons for any action it takes.<sup>86</sup> Official comments should accompany major rule changes, and at least general explanations should accompany minor changes.<sup>87</sup> In some instances, the rulemaker might

---

82. Proponents and opponents of a new rule on, for example, unauthorized practice of law, or class actions, or prepaid legal services, might be cross-examined about their own personal interests in such a rule; about the factual basis underlying their assertions regarding the need, or lack of need, for the rule in question; and about the rationales supporting the values which may have led them to comment as they did upon the proposed rule.

83. Federal administrative agency provisions have incorporated this approach. See, e.g., 15 U.S.C. § 2605(c)(3)(B)(EPA) (1976).

84. See notes 44-56 and accompanying text *supra*.

85. WEINSTEIN, *supra* note 1, at 152. But see GRAU, *supra* note 5, at 52.

86. In Ohio, proposed rules of evidence of the supreme court were rejected, in part because of the absence of comments. Walinski & Abramoff, *supra* note 9, at 350.

87. The need for rationales accompanying both federal judicial rules and federal administrative rules has received significant recognition. See, e.g., H.R. 480 and 481, 96th Cong., 1st Sess. (1979) (requiring comments to accompany federal judicial rules); 28 U.S.C. §§ 2072-2076 (1976) and 18 U.S.C. § 3771 (1976) (requiring that advisory committee notes accompany proposed rules); 42 U.S.C. § 7607(d)(6)(A) (Supp. 1978) (requiring EPA to provide with new rules "a statement of basis and purpose" and an "explanation of the reasons for any major changes"); Reform of Federal Regulation Act of 1979, *supra* note 47, at §§ 601-603.

even be required to respond directly, within its accompanying written rationale, to comments made during the period of public participation.<sup>88</sup>

To assure reasoned bases for judicial rulemaking decisions, records of rulemaking proceedings should be preserved and made available to all seeking access.<sup>89</sup> Records of rulemaking procedures safeguard against arbitrary action by facilitating discovery of whether proposals were rejected without adequate consideration or without significant reason. North Dakota, one of the few states providing for recordkeeping in state judicial rulemaking, requires certain judicial rules to be adopted only "after the hearing, completion of the record or filing of any briefs or comments, whichever is latest."<sup>90</sup> While recordkeeping is perhaps not very important in cases concerning the procedural and administrative purposes of "conduct of personnel" rules,<sup>91</sup> it seems quite important in cases of rules with widespread social impact and rules that have been based, in part, on factual findings.<sup>92</sup>

Questions concerning written comments, recordkeeping, and proper timing arise when more than one judicial rulemaker is involved with the promulgation of a particular rule. Should a single rulemaker be responsible for "official" comments? Should the ultimate rulemaker, judicial or nonjudicial, be permitted to adopt a rule without also adopting, or at least considering, and

---

Statements of reason or comments to new state judicial rules appear somewhat unevenly. Typically, such statements are not required; sometimes, they are made optional. See, e.g., N.D. SUP. CT. R., *supra* note 5, at § 9.3; N.D. LOCAL CT. R., *supra* note 5, at § 9.3. Explanatory statements to state judicial rules are prepared by such diverse rulemakers as *ad hoc* advisory committees to a state high court, judicial conferences, state supreme court staff members, and permanent advisory committees to a state high court.

88. At present, the Environmental Protection Agency is required to include "a response to each of the significant comments, criticisms and new data submitted . . . during the comment period" with many of its new rules. 42 U.S.C. § 7607(d)(6)(B) (Supp. 1978).

89. WEINSTEIN, *supra* note 1, at 152. But see GRAU, *supra* note 5, at 52.

90. N.D. SUP. CT. R., *supra* note 5, at § 9.1; N.D. LOCAL CT. R., *supra* note 5, at § 9.1.

91. See notes 10-11 and accompanying text *supra*.

92. Such rulemaking may cover, *inter alia*, rules on prepaid legal services, unauthorized practice of law, class actions, evidentiary privileges, and attorney advertising. See notes 50-52 *supra*.

revising the rule in light of, prior rulemaker comments? Should all makers of judicial rules be required to maintain complete records? What type of records should be kept, and how, if at all, should these records be made available to the public? These questions cannot be adequately answered without considering each individual rulemaking system.

#### D. *Permanent Rulemaking Mechanisms: Advisory Bodies*

An open judicial rulemaking system should include permanent rulemaking mechanisms. These may take many different forms within any state and for any particular judicial rulemaker. If partial responsibility for judicial rulemaking is held by the state high court, the established rulemaking system should include permanent bodies to advise the court.<sup>93</sup> Such bodies can give continuous attention to the validity of judicial rules. The number of advisory bodies required depends upon such factors as the size of the state, the makeup of its entire judicial system, the traditional legislative-judicial relationship within the state, and the extent and scope of the high court's rulemaking power. North Dakota's recently established rulemaking mechanism creates four standing committees: Joint Procedure, which is concerned with all rules of pleading, practice, and procedure; Attorney Standards; Judiciary Standards; and Court Services Administration.<sup>94</sup> In states like North Dakota, in which the high court possesses broad and relatively autonomous rulemaking authority, at least these four types of advisory bodies should be established to assure the development of sufficient expertise by the advisory body members.<sup>95</sup>

In order to insure that rules fulfill their intended functions, an advisory body should conduct a mandatory periodic review of

---

93. Such bodies are called committees, Miss. CODE ANN. § 9-3-65 (Supp. 1979); MD. RULES OF PROC., Rule 4(B) (1977), advisory boards, ARIZ. REV. STAT. ANN. § 12-110 (1956)(with the state bar or a representative group selected by the bar designated as the advisory board), or judicial councils. KAN. STAT. ANN. §§ 20-2201, 20-2203 (1974). One state has established a permanent legislative commission called the State Rules of Court Review Commission. N.J. STAT. ANN. § 2A:84A-39.1 (West 1976).

94. N.D. SUP. CT. R., *supra* note 5, at § 8.

95. The number of committees could, of course, be expanded if local needs dictated. A separate committee on evidence or separate committees for procedural rules relating to appellate, civil, criminal, and juvenile practice could be established.

all rules with a view toward rectifying any defects revealed by experience. Several methods could be used for such an evaluation. For example, an advisory body could solicit comments from the bar, legal scholars, and the public, or it could conduct an opinion survey among those affected by the rules under consideration. North Dakota's rulemaking system for rules of statewide applicability provides for a major re-examination every ten years.<sup>96</sup> In the interim, advisory bodies could process suggested changes and help effect needed reforms.

Definite requirements regarding the composition of the advisory bodies are necessary to assure participation by those particularly knowledgeable about, or concerned with, relevant rules.<sup>97</sup> There should be nonlawyer representation on as many of the advisory bodies as feasible, certainly, at least, on those involved with matters of major social policy. This would insure public representation in cases of potential conflict between the general public interest and the interest of the legal profession. If unfettered rulemaking power exists in the high court, thus precluding participation by other governmental branches, representation for legislative and executive branch members should be considered.

It should be noted that special circumstances, unlikely to be repeated, which call for the promulgation of judicial rules, might justify the appointment of an *ad hoc* advisory body. *Ad hoc* advisory bodies, which operate to reduce the high court's discretion, should be formally included in the rulemaking system to

---

96. N.D. SUP. CT. R., *supra* note 5, at § 8.6.

97. For example, an Ohio Review Commission, established to consider changes in the Ohio Traffic Rules, includes a general trial court judge, a municipal court judge, a county court judge, a municipal court clerk, the Superintendent of the State Highway Patrol, and several supreme court discretionary appointees. OHIO TRAFF. R. 22(B).

An advisory body on rules of criminal procedure should include at least one governmental prosecutor and one public defender or other comparable defense attorney. In Oregon, the Minor Court Rules Committee, responsible for advising on questions relating to "bail, rules, educational program procedures, records and reports in the minor courts," includes, *inter alia*, the Attorney General, the Superintendent of State Police, an administrator from the Department of Transportation, several judges, the Director of Agriculture, two gubernatorial appointees, and a member of the State Marine Board. OR. REV. STAT. § 1.510 (1979).

While certain types of representation should be mandatory, some appointments to advisory body membership should remain discretionary. The discretion may reside with the governor, *id.*, or with the high court. OHIO TRAFF. R. 22(B).

the extent possible, thereby giving notice of the possibility of constituting such a body.

Moreover, similar advisory bodies are appropriate in many situations in which a state's high court possesses little or no rulemaking power. Even if ultimate judicial rulemaking authority were vested in a conference made up of representatives from each, or many, of the state's different courts, advisory bodies to such a rulemaker would still be necessary.<sup>98</sup>

### E. *Public Initiative*

An open judicial rulemaking system should not limit participation by the public or the legal profession to proposed rule changes. Anyone interested should be able to initiate action by suggesting or petitioning for new rules or new rule amendments. Public initiative would not only further democratize the rulemaking system, but would simultaneously make it more effective by making it more responsive to the problems in the judicial system. The procedures for initiating rule changes should be expressly outlined in order to guarantee public awareness and easy accessibility. While few judicial rulemakers explicitly provide for public initiative, the Supreme Court of North Dakota has gone quite far by permitting anyone "interested in a procedural rule, administrative rule or administrative order" to petition the appropriate rules committee for action.<sup>99</sup> Nevada's high court has promulgated an initiative provision limited to judges and certain executive officers of the supreme court and the state bar.<sup>100</sup>

Public suggestions may vary in form. Some initiatives now go directly to a high court advisory committee<sup>101</sup> while others go

---

98. In New York, for example, certain rulemaking power is delegated by the legislature to a court administrator. See N.Y. CONST. art. 6, § 30; N.Y. JUD. LAW § 212(1)(i), (2)(d) (McKinney Supp. 1980). This administrator, in turn, is advised by the state judicial conference, *id.* at § 215(1), (3), as well as the administrative board of the courts. N.Y. CONST. art. 6, § 30. In Oregon, the Council on Court Procedures makes procedural rules, OR. REV. STAT. § 1.735 (1979), and may be advised by the judicial conference. *Id.* at § 1.820.

99. N.D. SUP. CT. R., *supra* note 5, at §§ 3.1, 4.1. Similar initiatives are permitted with respect to local court procedural rules or administrative rules. N.D. LOCAL CT. R., *supra* note 5, at §§ 3.1, 4.1.

100. NEV. R. AD. DOCKET, *supra* note 5, at § 3.2.

101. MISS. CODE ANN. § 9-3-69 (Supp. 1979).



to the high court or its clerk,<sup>102</sup> or to a bar association.<sup>103</sup> Nevada and North Dakota impose time limits on rulemakers' decisions regarding suggestions for proposed rule changes.<sup>104</sup> The rulemakers should have the power to screen out obviously frivolous suggestions so that time can be reserved for meritorious proposals.<sup>105</sup>

A state's judicial rulemaking system might be comprised of any number of different judicial rulemaking bodies. Many or all of such bodies might possess rulemaking responsibilities for only certain types of judicial rules. In these states, effective communication among all of the rulemakers is imperative. Perhaps, a member of a state high court's staff could be designated as an *ex officio* member of each rulemaking body. In this way, the various bodies could be kept informed of each other's work, and misdirected proposals could be forwarded expeditiously to the proper body.

## VI. Conclusion

Public process should play an essential part in the consideration and final promulgation of judicial rules. Public process is absent in most state judicial rulemaking, regardless of the type of rule or the nature of the judicial rulemaker. Although states vary widely in their forms of judicial rulemakers and in the types of rules subject to judicial rulemaking, public process is adaptable and can be implemented in all state judicial rulemaking systems.

---

102. See note 79 *supra*; ARIZ. REV. STAT. ANN. § 12-110(B) (1978). At times, for example, with bar unification (integration), such initiatives become cases. *In re Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956).

103. O'Connor, *How You Can Change a Texas Rule of Civil Procedure*, 41 TEX. B.J. 1073, 1075 (1978).

104. NEV. R. AD. DOCKET, *supra* note 5, at §§ 4, 5; N.D. SUP. CT. R., *supra* note 5, at § 3.3.

105. Both North Dakota and Nevada have given this authority to their rulemakers. N.D. SUP. CT. R., *supra* note 5, at § 3.5; NEV. R. AD. DOCKET, *supra* note 5, at § 4.3(a).

## Acknowledgment

The unadorned pages of a completed issue of a law review belie the complexity and intensity of the process by which it is produced. The inaugural issue of a review requires an even greater effort: initial problems are encountered and solved; decisions are made; and policies are established. This inaugural issue of *Pace Law Review* is the product of over two years of planning and hard work; the efforts of many are reflected in its pages.

We are grateful for the encouragement and support of the administration of Pace University and the faculty and administration of Pace University School of Law. We are especially grateful to Professors Barbara J. Black, Hervey M. Johnson (Chairperson), Irene D. Sann, and Ralph M. Stein, the members of the *Pace Law Review* Faculty Committee, who illuminated for us those high standards of scholarship essential to law review publication.

We are deeply indebted to the *Review* editors and staff of the class of 1979, the first graduating class of Pace University School of Law, who worked with the Faculty Committee, beginning in the spring of 1978, to found the *Review*. We are pleased to include their masthead in this inaugural issue.

We are also indebted to the 1980-81 *Review* editors, who, upon our graduation, willingly assumed and completed the work of publication: Editor-in-Chief: Barbara R. Diehl; Managing Editor: Frank Giliberti; Articles Editor: Nancy Kane Felcher; Research and Writing Editor: Hannah S. Gross; Casenote and Comment Editors: Sandra Edlitz, Gregory E. Koster, Garie Jean Mulcahey, Judith Perlstein Platt.

Finally, we thank our secretary, Michele Racioppo, for her dedicated efforts.

It is our sincere desire that *Pace Law Review* will make a valuable contribution to legal scholarship. Again, we thank all of those who have helped to make this contribution possible.

Board of Editors  
1979-1980