Rules of Criminal Procedure: The Background of Draftsmanship

James G. France
University of Akron School of Law

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

Part of the Criminal Law Commons, and the Criminal Procedure Commons

How does access to this work benefit you? Let us know!

Recommended Citation
available at https://engagedscholarship.csuohio.edu/clevstlrev/vol23/iss1/34
Rules of Criminal Procedure: 
The Background of Draftsmanship 
James G. France*

While Ohio's Rules of Criminal Procedure, effective July 1, 1973, are entirely new to the criminal law practitioners, it is not the purpose of this article to point out the difference between the present and the past in terms of how a criminal case should be prepared for trial and tried. Rather, the emphasis here is on the background of formulation of the rules in terms of Ohio's experience both in drafting rules and in borrowing and adapting rules from other fields, from other jurisdictions, and sometimes from other generations to achieve what the Chief Justice of the Supreme Court of Ohio has described as the most advanced practices in the nation.¹

Ohio Rulemaking Before 1968

There is some disposition to believe that the Supreme Court of Ohio, before 1968, had no rule making power to control the procedural conduct of the trial courts, and that all power and all experience in the field had to be acquired subsequent to the co-called Modern Courts Amendment to article IV of the state constitution in that year. Such a statement is not altogether accurate, at least so far as the civil operations of the common pleas courts of the state were concerned. For many years the Supreme Court, as a part of its own rules of procedure, carried a provision regulating continuances for trial in those courts.² There was no apparent attempt to enforce the rule or even to publicize it for the information of the courts concerned. The provision was quietly deleted from the Court's rules in 1964, four years before the constitutional grant of rule making and supervisory power to the Supreme Court.³ Whether the occasion and the reason for the deletion was its patent lack of effectiveness, or part of a covert preparation for publicizing the great need for achieving an express grant of the power, is not easily ascertainable. No recorded statement of the reasons for the deletion was ever published.

* A.B., Brown University; L.L.B., Yale University; Professor, University of Akron School of Law; former Judge, Ohio Court of Appeals, Seventh Appellate District.


² Ohio Supreme Court Rule XXV, dealing with this problem in the Courts of Appeals as well, had appeared in the Published Rules Other than those Peculiar to the Supreme Court since 94 Ohio St. (1917). The rule disappeared in the revision published in 176 Ohio St. (1964).

³ Ohio Const. art. IV §5 (B), as enacted May 7, 1968.
In theory, however, the Supreme Court still maintained a species of control over trial court rules through an assumed power to approve or disapprove local court rules as they were adopted by the various trial courts and filed with the Supreme Court. The power was not discernably exercised on any administrative or supervisory basis, but only as the adherence to and reliance on their own local rules by the trial courts were assigned as errors of law during the course of appeal. One such rule, by the Cuyahoga County Court of Common Pleas, would have reduced the number of civil jurors serving in a case from twelve to six in certain civil cases. The Court, on appeal by the plaintiff from an adverse verdict at the hands of a six-man jury, struck down the local rule as unconstitutional in 1935. This was a generation before the adoption and approval of a much more stringent rule by the Butler County court, and before the adoption of almost identical provisions by the Supreme Court on a uniform, compulsive basis in Ohio's 1970 Rules of Civil Procedure and the Rules of Superintendence which followed. Other local rules were reviewed in the same manner but inferentially, as the various Courts of Appeal approved or rejected the local rules and the Supreme Court declined to extend the opportunity for further review. The bulk of such rules dealt with trial practice or trial scheduling, but a few dealt with matters of pleading or discovery, and the local rules themselves became so numerous and detailed that published collections of them were made and sold to practitioners.

The common pleas court local rules were the product, like the Supreme Court's early lonesome venture, of an assumed or inherent power to regulate practice. There was neither a constitutional nor a statutory grant of express power for their adoption with respect to the courts of general jurisdiction in the state. In this respect, Ohio's prevalent form of limited jurisdiction court of record, the municipal courts, had a distinct advantage. As in most states, the municipal courts were created in hodge-podge fashion as local need arose, some

---

4 Few common pleas courts chose to file their rules with the Court, but they were encouraged to do so by the then Administrative Assistant to the Supreme Court, predecessor of the Administrative Director.


6 Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967); see Dailey v. State, 4 Ohio St. 57 (1854).

7 Ohio R. Civ. P. 38(B).

8 Brown v. Mossop, 139 Ohio St. 24, 37 N.E.2d 98 (1941); Van Ingen v. Berger, 82 Ohio St. 255, 92 N.E. 433 (1910); Simmons v. State, 75 Ohio St. 346, 79 N.E. 555 (1906).


https://engagedscholarship.csuohio.edu/clevstlrev/vol23/iss1/34
with extensive rule making power, some with little, and some entirely
without it. In 1951, the legislature did create a more or less uniform
minor court structure in a general Municipal Court Act with its civil
pleading rules governed by those imposed by statute on the common
pleas courts. The Act included specific authority to adopt court rules
in aid thereof.\(^{10}\) Many of the courts took advantage of the rule
making power thus conferred to adopt specific court rules in aid of the
statutory procedure. Generally these municipal court rules were more
sweeping, better coordinated, and more detailed than the common
pleas court rules had been. But it was in the criminal practice area
that real improvements by rule making were made. The municipal
court criminal practice was not governed (as was civil practice) by
the antiquated statutory common pleas court procedure designed for
felony trials. It was rather governed by that provided for another
type of state limited jurisdiction tribunal, the now almost-vanished
court,\(^{11}\) and in default of such provision, by justice of the peace
procedure. There was no need, however, for the municipal courts to
fall back upon the procedure of the squires, since the legislature had
thoughtfully provided the police courts with full rule making power
determining their procedure.\(^{12}\) As a result, many of the more pro-
gressive municipal courts took full advantage of the borrowed power
so provided them, and prior to 1960 instituted a system of motion
practice similar to that of the Federal Rules of Criminal Procedure,
in substitution for the ritualized motion to quash and demurrer sys-
tem specified for felony trials in the common pleas courts. Some courts
also set simplified bail bonding schedules and procedures.\(^{13}\) Some even
used the rule making device to adopt the American Bar Association’s
Uniform Traffic Ticket affidavit forms in substitution for plain form
affidavits and warrants in traffic cases as previously used.\(^{14}\)

The free use of the rule making power by municipal courts in
criminal matters, with its attendant variety among the courts and
disparity of rule output, was somewhat restricted in 1960 by new

\(^{10}\) Ohio Municipal Court Act, created by S.B. 14, 1951, OHIO GEN. CODE, §§1581-1617
(1951). Rule making authority is now conferred in OHIO REV. CODE ANN. §1901.13(c)
(Page 1968).

\(^{11}\) OHIO REV. CODE ANN. §1901.21(A) (Page 1968). By 1967 all of the once numerous police
courts in Ohio, except that in Ottawa Hills, Lucas County, had been converted to municipal
courts.

\(^{12}\) OHIO REV. CODE ANN. §1903.16 (Page 1968).

\(^{13}\) The motion practice thus instituted was codified and made uniform by S.B. 73, 128 LAWS
OF OHIO 97 (1959) amending various sections of Chapter 2937, OHIO REV. CODE,
partic-
ally §2937.04. For a description of the effect, see Willoughby v. Hudgeck, 2 Ohio App.2d

\(^{14}\) In some cases the results were unfortunate as courts uncritically adopted forms with jurats or
specifications designed for use in other jurisdictions and defective under Ohio law. See In-
formal Opinion No. 50 of Attorney General to the Director of the Ohio Dept. of Highway
Safety, Jan. 6, 1958; Willoughby v. Hudgeck, 2 Ohio App.2d 36, 206 N.E.2d 234 (1964),
discussed in France, The Ohio Supreme Court’s Traffic Court Rules: A Beginning of Pro-
cedural Rule-Making, 1 AKRON L.REV. 1, 10 (1968).
The legislation itself was no mere piece of cancellation of an existing power. Drawn and sponsored by the Ohio State Bar Association’s criminal law committee, the new act rewrote much of Ohio’s then century-old law dealing with arrest and detention, arraignment before the magistrates, and preliminary hearings in felony matters. It also enacted an entirely new chapter of the Ohio Revised Code dealing with the trial of misdemeanors before the limited jurisdiction courts. Many of the provisions of the Federal Rules of Criminal Procedure were adopted in statutory form. The federal plea of nolo contendere was adapted for use in misdemeanor cases, translated into English, given a slightly changed definition and a different thrust as a new (to Ohio) plea of no contest. The old forms of special pleading were abolished, and motion practice similar to that of Federal Criminal Rule 12 was substituted for them. Bail provisions were collected from many disassociated chapters of the Ohio Revised Code and simplified, as were the procedures for collecting on forfeited bail. The former vice of prosecution by private attorney for the complaining witness was eliminated, and the much-condemned practice of trial of misdemeanors by the mayors’ courts was restricted by liberal (but mandatory) provisions for transfer of contested cases to limited jurisdiction courts of record. The American Bar Association type of traffic ticket affidavit was expressly sanctioned and the use of warrants in connection with it made entirely unnecessary.

The changed statutory procedure could perhaps be criticized in one respect. It was a legislatively-designed procedure, not a sweeping grant of rule making power to the Supreme Court for devising the provisions in rule form. But there seemed at that time to be no appetite on the part of the Ohio Supreme Court to indulge in rule making; the makeup of the Ohio high bench did not seem conditioned to the civil libertarianism marked by the Federal Rules. Instead there was introduced, as something of a challenge to the Court, a pair of statutory provisions that permitted it to adopt uniform rules of practice “not inconsistent with the provisions of Chapter 2937 of the Revised Code” governing practice and procedure in criminal cases in courts of limited jurisdiction. The power to impose these rules
went unused for nearly eight years after the effective date of the legislation,\textsuperscript{22} and very nearly to the date of passage of the Modern Courts Amendment to Ohio's constitution, with its grant of full rule making power.

It is perhaps noteworthy that while criminal procedure is the last of the various areas to be covered by the blanket of constitutionally authorized uniform rules imposed by the Supreme Court under its Modern Courts grant of authority,\textsuperscript{23} it was the first area in which the Court took the opportunity to engage in the draftsmanship of uniform rules. It is true that the area was a comparatively narrow one: filling in the omissions of the statutory plan for the preliminary hearing of felonies, and for the arraignment of defendants to be tried for misdemeanors in the limited jurisdiction courts. Admittedly this is not the most glamorous area of rule making operations. It was not, however, as narrow an area as the Court itself eventually described it. While the rules finally evolved, purported by title to be concerned only with traffic cases, and are officially referred to as the Uniform Traffic Rules, both the grant and the exercise of the rule making power are far broader.\textsuperscript{24} Many of the detailed provisions relating to forms of pleading, the use of referees and of violation bureaus, indeed relate purely to traffic cases. But the provisions for arraignment of defendants, for the filing and consolidation of pretrial (and pre-plea) motions, for the application of the canons of judicial ethics to the lay judges, for the transfer of cases, and for the required personal appearance on entry of plea, by their terms, relate not merely to traffic offenses but to all misdemeanor prosecutions.

The principal difficulty in securing the adoption of these supplementary rules, as precursors of a uniform rule system in Ohio, lay not in any difficulty in drafting them, but in convincing the Court of the desirability of their adoption. Most of the rules which gave rise to difficulty were those which were merely slight adaptations of the time-tested New Jersey and Missouri rules dealing with the traffic ticket. It was to these changes that police agencies took greatest exception.\textsuperscript{25} By contrast, those rules imposing motion practice and the consolidation of pre-trial motions for hearing drew very little argument. But the timing was wrong for disputes with police agencies over their prerogatives. The Ohio Supreme Court had just decided

\textsuperscript{22} The rule making power became effective January 1, 1960, the effective date of S.B. 73, 128 \textsc{Laws of Ohio} 97 (1959). The rules were promulgated December 4, 1967.

\textsuperscript{23} Preceding the criminal rules were the civil rules (1970), appellate rules (1971), superintendence rules (1971), government of the bar rules (amended, 1971) and juvenile rules (1972). First draft of the juvenile rules was published in 44 \textsc{Ohio Bar} 1589 (1971), after that of the criminal rules, 44 \textsc{Ohio Bar} 1183 (1971).

\textsuperscript{24} See 40 \textsc{Ohio Bar} 1434 (1967).

\textsuperscript{25} The size and shape of the uniform traffic ticket posed even greater problems than its content. Most police departments argued in brief that their file drawers would become useless and have to be replaced at great expense.
State v. Mapp\textsuperscript{26} and certiorari had just been granted by the Supreme Court of the United States for its review as Mapp v. Ohio. When the drafting committee presented its report, drawing objections from police agencies, the Court decided to hear the objections by argument in open court. The agencies were not timid in showing their resentment of the interference of court rules with their cherished practices, perhaps in anticipation of the release of the opinion in Mapp,\textsuperscript{27} and certainly in anger at the drafting committee's unwise reference to Cleveland traffic ticket fixing scandals then going on. The Court denied the motion for adoption of the rules and added police representatives to the committee. A second submission, in July of 1961, brought no better results. By that time the opinion in Mapp, with its criticism of the largest police department in the state, had just been released. Six months later, while the Court still held the motion for rules adoption under advisement, the chairman of the drafting committee, then a Common Pleas judge, decided a case in Cleveland contrary to police contentions. Shortly thereafter, he resigned his post as draftsman.\textsuperscript{28} The fact that the resigned chairman had, in the case in question, chosen to extend the Mapp doctrine, may have had something to do with the "lack of unanimity of police agencies" which the Court cited as its reason for declining to adopt the rules "at this time."\textsuperscript{29} In any event, nearly five years were to elapse with inaction on the authorized rules until, on the eve of the submission of the Modern Courts Amendment, the reorganized drafting committee submitted a slightly amended and re-entitled draft of the rules which the Court adopted as the Uniform Traffic Rules.\textsuperscript{30} These rules, adopted in 1967, have remained in effect through the Modern Courts Amendment and beyond. They have been confirmed in their effectiveness in their limited area even under the recently effective Rules of Criminal Procedure, and stand not only as the rules longest in existence in Ohio, but those least challenged by litigation.

No claim can be made for the comprehensiveness of the mistitled Uniform Traffic Rules. They operate in a small segment of the criminal process and they are just what they purport to be: provisions to correct oversights in the 1959 legislative scheme of misdemeanor

\textsuperscript{26} 170 Ohio St. 427, 166 N.E.2d 387 (1960).
\textsuperscript{27} Mapp v. Ohio, 367 U.S. 643 (1961).
\textsuperscript{28} The case, State v. Miller, (unreported) No. 74750 Cuyahoga County Court of Common Pleas, was decided November, 1961; the resignation took place January, 1962; Journal Entry declining to adopt the rules was entered February 14, 1962.
\textsuperscript{29} The extension of Mapp involved instructing a jury not only to disregard a lineup identification in a larceny case, because made after a defendant had been held by police without opportunity for bail for four days, but to disregard the subsequent in-court identification if they found it the product of the lineup identification.
\textsuperscript{30} 40 OHIO BAR 1434 (1967), adopted December 4, 1967, to be effective January 1, 1968.

https://engagedscholarship.csuohio.edu/clevstlrev/vol23/iss1/34
arraignments, motion practice, continuances, and trial consolidations, plus provision for uniformity of chargings, notices, and dispositions of traffic cases in the limited jurisdiction courts. No authority has claimed for them any special achievement in the more engaging fields of felony arraignment and trial, but they stand as the underrated first achievement in uniform rule making by the Supreme Court of Ohio.

The Rules of Civil Procedure

After the adoption of the Modern Courts Amendment to the Ohio constitution in the spring of 1968, the Supreme Court's former leisurely approach to rule making ceased, but it was not any further simplification of the criminal process which was the first order of business. The criminal rules, most controversial of the many practice rules to be adopted in a three year time span, were also the last on the Court's list. Instead, work was immediately begun on the drafting of rules of civil procedure with the objective of meeting a deadline of January, 1969. This deadline for their submission to the legislature, as required by the amendment, was necessary to make them effective in July of that year. The deadline was (perhaps fortunately) missed, since in the short space of time available, a drafting committee could scarcely have been expected to do more than present the thirty-year-old Federal Rules of Civil Procedure, with a few appropriate changes of language to adopt them to Ohio use. But the federal rules themselves were at that time in the course of amendment, and an extra year of study enabled the Ohio rule draftsmen to study the preferred federal amendments in connection with their drafting problem. Ultimately, it gave an opportunity to the criminal rules draftsmen for additional study in how the new rules, adopted in 1970, would work in their new setting.

To understand the influence of the Federal Criminal Rules on the new Ohio Rules, which conform to the Federal Rules at least in numbering, it might seem tempting to follow them rule-by-rule, noting changes, adoptions, and departures as they occur. But this approach would ignore the history of why the Ohio draftsmen chose to tinker with the model. The history of the changes wrought by the draftsmen of the Ohio Civil Rules on their federal model, gives some insight into the reasons for the later changes. In adopting the civil rules, Ohio had the benefit of more than thirty years of federal court experience, and occasional amendment of the federal rules as experience proved amendment necessary. It might be thought that there was little need for change in the model to adopt it to Ohio use, but this was not to be. The Ohio drafting committee made major changes in no less than twenty-eight of the first sixty federal rules. These

31 See supra note 23.
changes were of three types: those which went beyond the realm of procedure by attempting to change the law of jurisdiction and venue; those which went out of their way to preserve existing practice quirks eliminated by the federal rules; and those which added a multitude of operational detail to the rules so that every specific situation likely to arise might be expressly, not merely generally, covered for the guidance of the lawyers and judges (implying that Ohio judges could not be trusted to apply general language to specific situations).

In the first group of Ohio civil rule departures from the federal model, fortunately not repeated in the criminal rules, there occurred an unfortunate misreading of the concept of in personam jurisdiction and a confusion of it with venue, despite the fact that the model rules had conspicuously avoided passing on either problem for more than thirty years. Ohio Civil Rule 1(A) both extends the application of the civil rules to "all courts of this state," and limits their application to that "in the exercise of civil jurisdiction." Rule 82 goes farther to declare that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of this state." Within the framework of these restrictions the committee recommended, and the Supreme Court adopted, Rule 4.6 (A), which provided that all process might be served anywhere in the state; Rule 3 (B), that any action may be "venued" [sic] in any court in any county; and Rule 3 (G), that the rule related to venue was not jurisdictional. These three rules, taken together, made no change whatsoever in the jurisdictional powers of the common pleas court. Their exercise of in personam jurisdiction has always been statewide with only venue, or the place of trial, as the limiting factor. But the limited jurisdiction courts, particularly the municipal courts, were not so situated. As to them, in personam jurisdiction has long been limited by the statutes creating them to civil actions "in which the subject matter (res) of the action or proceeding is located within the territory, or when the defendant or some one of the defendants resides or is served within the territory." Thus the effect of Rule 4.6 (A) and Rule 3 (G), confused as the language was and despite the self limiting rules, appeared to enlarge the in personam jurisdiction of the limited jurisdiction courts and to make their process not only servable but effective to confer jurisdiction throughout the state of Ohio. The appearance became a reality when the Court in Morrison v. Steiner effectively abolished the stat-

33 The Federal Rules of Civil Procedure are entirely silent on the question of venue, which is left to be determined by 28 U.S.C. §§1391, 1392. Territorial limits of effective service are fixed by Rule 4 (f) as the state lines of the state in which the federal district is located, except in the case of additional and third party defendants where a hundred-mile rule is in effect.


35 OHIO R. CIV. P. 4.6 (A); see J. MCCORMAC, OHIO CIVIL RULES PRACTICE §3.24, at 44 (1970).

36 32 Ohio St.2d 86, 290 N.E.2d 841 (1972).
utory limitations on in personam jurisdiction by denying that there was any such concept as in personam jurisdiction for municipal courts. It held that if a court, any court, had subject matter jurisdiction and venue was proper, no impediment to a valid judgment existed. The opinion of Justice Herbert, concurred in by a unanimous court, disposed of the whole question of in personam jurisdiction in four quick sentences:

Appellant contends that Civ. R 3 (B) cannot constitutionally provide for the issuance by a municipal court of services beyond its statutorily prescribed territorial boundaries. However, appellant misconceives the nature of municipal court subject matter jurisdiction (as opposed to territorial boundaries) and how the Rules of Civil Procedure operate within the limits imposed upon that jurisdiction by the General Assembly.

Subject matter jurisdiction of a court connotes the power to hear and decide a case upon its merits, while venue connotes the locality where the suit should be heard. Subject matter jurisdiction defines the competency of a court to render a valid judgment in a particular action. (Citations omitted)

Undoubtedly the General Assembly was guilty of poor use of language when it specified in Section 1901.19 (D) of the Ohio Revised Code that the municipal courts had jurisdiction in actions in which the subject matter of the action was located within the county, when it obviously meant the subject of the action or res was so located. Subject matter as a jurisdictional concept has no tangible substance and therefore is incapable of physical location. This should have been obvious to the Court, even without considering the latter part of the same sentence used in the statute: "... or when the defendant or some one of the defendants resides or is served with summons within the territory." The concept of limited territorial in personam jurisdiction of the municipal (and county) courts as a distinct non-procedural matter had been recognized by the Court in 1955 in Gibson v. Summers Construction Co., and in numerous cases thereafter.

37 The opinion in Morrison v. Steiner, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972) is devoid of any mention of the term "in personam jurisdiction." MCCORMAC, supra note 35, at 44, makes the bald statement: "The right to obtain personal jurisdiction over the defendant anywhere in Ohio is thereby broadened from only particular actions to all types of actions in all Ohio Courts." (emphasis added).

38 32 Ohio St.2d 86, 87, 290 N.E.2d 841, 842 (1972).


It is thus difficult to believe that neither the Advisory Committee nor the Court was aware, both in adopting Rule 4.6 and in the *Morrison* decision, that they were trespassing on jurisdiction (and hence forbidden) territory. Certainly the Court, if not the Committee, should have been aware before *Morrison*, of Chief Judge Leddy's comments on attempting to alter substantive right provisions of a statute by adopting and interpreting purely procedural rules.\(^{41}\)

The venue changes as determined in Rule 3 (D) stand on an entirely different footing. This is procedural territory in which the Court could, and did, romp at will. There was cause in Ohio for removing some of the more absurd restrictions on venue, imposed a generation ago, which gave selection of the wrong venue, or place of trial, the consequences of jurisdictional failure.\(^{42}\) While the Supreme Court of the United States has always wisely elected to stay out of the venue field in its procedural rule making, possibly the Ohio venue morass was so bad that the Ohio Supreme Court felt in all conscience, that it could not remain aloof from it. The question was not one of power, but of judgment in how far to go in correcting the situation. The end result was that the Court, at the behest of the drafting committee, its staff and its consultant, went all the way in the "new concepts"\(^{43}\) espoused by the consultant, and made venue almost entirely a matter of plaintiff's choice. Experience under the rules indicates that plaintiff's choice is almost invariably the plaintiff's place of residence regardless of any argument to be made on behalf of a more convenient forum. Just as in New York and California, the courts have opted for plaintiff's choice of his home forum in interstate litigation.\(^{44}\)

In the area of tinkering with the results of thirty years of experience with the federal rules, as related to civil trial practice, the Ohio draftsmen managed to try no less than five major departures. The first of these was a crude redrafting of Rule 16, governing pre-trials. Under the progenitor system this rule had been allowed to develop as a flexible tool, with each individual judge using it in ac-


cordance with his particular expertise and personal habits to simplify issues, to gain stipulations of fact, to order the course of trial, and frequently to achieve settlements. The Ohio approach was to add rigidity to the procedure by stifling individual variances. Instead of granting the individual options to the judges, the Ohio rule inferentially permits a pretrial conference only if a majority of the judges in a multi-judge court desire to impose it. It then requires the course of the pretrial to be fixed by a local rule, uniform in its application to all the judges. The rule makes the foremost of its objectives the settlement of the case, an objective which Justice Brennan who helped to design the New Jersey pretrial system, and Professor Rosenberg who surveyed it, agreed was the least worthwhile of the objectives and the least likely to be achieved at pretrial conference. The Ohio rule follows with four stated objectives, none of which were included in the federal model, and three of which are exceedingly minor and pedestrian. But the fourth addition, that of enabling the court to reserve the imposition of sanctions for evading or refusing discovery, completely nullifies the basis of the conference as a meeting of fully informed and prepared adversaries with the judge. For a pretrial conference to be anything more than a generalized meeting for idle chatter it is essential that discovery be complete so that counsel are both informed of their adversaries' cases and in position to inform the judge of settlement possibilities and length of trial if not settled. To his credit, Dean McCormac, the consultant to the Court, attempted in his practice book on rules procedure to emphasize that information must be complete by pretrial time, and that settlement discussion should be the last, not the first of the objectives. His views apparently did not prevail with the committee and the Court.

The remaining "improvements" on federal rule theory consist of retaining the unqualified right of attorneys to romance the jury panel on voir dire, which the federal rules permit the judges to restrict or eliminate, of abolishing the highly successful institution of the spe-

45 OHIO R.CIV.P. 16: "A court may adopt rules concerning pre-trial procedure to accomplish the following objectives: (1) the possibility of settlement of the action . . . ."


47 The additional objectives peculiar to Ohio in Civil Rule 16 are: "(3) Itemizations of expense and special damages; (5) The exchange of reports of expert witnesses expected to be called by each party; (6) The exchange of medical reports and hospital records; (7) The limitation of the number of expert witnesses."

48 MCCORMAC, supra note 32, §11.02 at 281, 283: "It is recommended that the court order all discovery to be completed prior to a pre-trial conference."

49 Id. "Settlement is really a byproduct of a well conducted pre-trial conference rather than an end in itself. The judge should encourage settlement but should not force litigants to settle . . . ."

50 Compare OHIO R. CIV. P. 47 (A): "The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In (Continued on next page)
cial verdict, merely because some Ohio judges had handled it woodenly and given offense to eminent counsel in so doing, \(^51\) of continuing the wasteful and unrealistic system of permitting prevailing counsel to draft findings of fact and conclusions of law in trials to the courts, \(^52\) and finally of omitting the federal requirement that the basis of a motion for judgment notwithstanding the verdict, dealing primarily with the omission of an essential legal element of proof, had to be raised by motion for directed verdict at trial, thus perpetuating the Ohio tradition of trial from ambush. \(^53\)

But despite the dubious nature of the foregoing improvements on the federal model, perhaps the greatest disservice the Ohio draftsmen performed on the Ohio rules was the addition of quantities of additional verbiage, which appear to accomplish little in clarity of expression. Extreme examples are the process rules, which in the federal rules rendition take 149 lines of type and in the Ohio version 342 lines, \(^54\) the compulsory joinder rule, \(^55\) 37 lines in the federal version and 72 lines for Ohio, the principal perpetuation of evidence and discovery rule \(^56\) with 74 lines of type for the federal and 96 lines for

\(^{51}\) OHIO R. CIV. P. 49 (C): "Special verdicts abolished. Special verdicts shall not be used.

Special verdict authority under the Ohio General Code and Ohio Revised Code provisions had been subject to frequent amendment, culminating in the amendment of OHIO REV. CODE ANN. \(\$2315.14\) (Page Supp. 1955) to reflect that the special verdict did not make findings of fact but findings on "determinative issues." In Miller v. McAlister, 169 Ohio St. 487, 160 N.E.2d 231 (1949), the trial judge had submitted findings on what the Supreme Court viewed as evidentiary matters. In Miller's opinion, the court's opinion Zimmerman, J. was at pains to specify what the determinative issues in a negligence case were and to draw a model special verdict form for such cases for the future guidance of trial judges. Later, in Sudia v. Dietrich, 6 Ohio St.2d 160, 216 N.E.2d 882 (1966), a trial judge let counsel argue a negligence action to the jury and then, only after the argument was concluded, did he determine on his own motion to submit a special verdict. The opinion reversing for failure to make his decision a timely one, contains much criticism of his conduct which "tends to weaken the relationship between judge and counsel which is an essential attitude of a court . . . ."

\(^{52}\) OHIO R. CIV. P. 50 (B) differs from Federal Rule 50 (b) primarily in the introductory clause. Ohio Rule 50 (B) provides: "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment a party may move . . . ."

\(^{53}\) It could be argued that the additional verbiage was necessitated by the fact that Ohio Civil Rules 4 through 4.6 govern a greater number and more diversified types of courts than the corresponding Federal Civil rules; however, the author feels such an argument untenable. See text at notes 37-40, supra.

\(^{54}\) OHIO R. CIV. P. 19 & 19.1.

\(^{55}\) OHIO R. CIV. P. 26 & 27.
Ohio. The nature of the additions are in some cases amusing, since the additional verbiage is to correct over-technical or uninformed interpretations that Ohio courts had previously given to Ohio statutory procedure. A case in point is the so-called Hudzik paragraph of Rule 8 (H), requiring a disclosure of defendant's incapacity. It resulted remotely from the Supreme Court's successful attempt to protect a young plaintiff's attorney from the results of his carelessness in the early years following Ohio's adoption of the single cause of action theory as pronounced in Rush v. Maple Heights, when the attorney simultaneously sued his assumed two causes of action in separate courts. The ruling was that defendant's counsel had the somewhat unusual duty of informing plaintiff of his error and that if he did not do so, he had waived any objection to the splitting of the cause of action. Following this unusual reported decision, a Court of Appeals applied the same logic to another liability carrier's counsel, whose defendant, then a minor, was sued and served as an adult. This time the Supreme Court did not see defendant's counsel's duty in the same light and, in Hudzik v. Alcorn approved a dismissal of the action, notwithstanding that the General Assembly had, in the meantime, passed two statutes to correct such a situation, one requiring the disclosure of incapacity, the other permitting service on minors in such cases as if they were adults. Thus the Hudzik decision became inoperative as to future cases from the moment of its rendition and the special statute overruling it became Rule 8 (H), and its companion statute on minor service became Rule 4.2 (2). Both statutes were later repealed in 1971 as material covered by the Rules of Civil Procedure.

As will later be discussed, jurisdictional misconceptions furnished no problem for those who synthesized the Ohio criminal procedure rules from the federal rules, nor did the assumed need of preserving Ohio's tricks of "trial from ambush" cause them any difficulty. But the prolixity problem created by attempting to devise a specific cure for each specific fault in the previous Ohio criminal practice did haunt the criminal rule draftsmen. One result is the extortionate length, verbiage, and detail of the new Rules of Criminal Procedure.

57 167 Ohio St. 211, 147 N.E.2d 599 (1958).
58 Shaw v. Chell, 176 Ohio St. 375, 199 N.E.2d 869 (1964).
59 Hudzik v. Alcorn, No. 4441 Court of Appeals, Mahoning County (unreported 1964).
60 4 Ohio St.2d 45, 212 N.E.2d 419 (1965).
61 131 LAWS OF OHIO 648 (1965). Section 2309.261 OHIO REVISED CODE.
62 131 LAWS OF OHIO 666 (1965). Section 2703.131 OHIO REVISED CODE.
63 The repeal was in 1971 as part of Omnibus Bill, repealing sections of the statute covered by the Rules. For recitals in Omnibus Bill, see Section 3, of House Bill 1201. pocket parts to Pages Revised Code Annotated.
Appellate Rules and Rules of Superintendence

In the list of borrowings and adaptations for the Ohio rules structure prior to the Rules of Criminal Procedure, there was of course, that of the Appellate Rules. But with a single exception, the problems of adaptation had little impact on the criminal procedure studies. This exception involved the necessity for adding verbiage to overrule a particular case. It is reflected, like the Hudzik paragraph, in a single added sentence to Appellate Rule 4. The federal appellate rules have permitted notice of appeal to be filed “within thirty days of judgment.” Ohio adopted the same language, thus unifying what had been a diverse series of time limitations between civil, felony, and misdemeanor appeals; but Ohio also found it necessary to interpolate a strange sentence specifying that a notice of appeal filed before the entry of judgment “should be deemed to be filed” on the day of judgment and immediately thereafter. The rule thus cured for the future one of the more egregious examples of establishment injustice suffered by campus militants in an early prelude to the Kent State tragedy. In this earlier episode an ex parte injunction, issued to prevent rioting, had arguably been violated by militants and a trial and finding of contempt was made within a few days of the episode. Notice of appeal immediately followed the oral pronouncement of sentence from the bench. Prevailing counsel then merely held up the journal entry of sentence for eighteen days, filed it, waited for appeal time from the journal entry to run, and moved to dismiss the original appeal as prematurely, and hence improperly, taken. The Court of Appeals immediately granted the dismissal motion in a rather inept opinion to which was attached a scathing concurrence by the resident appellate judge, criticizing appellants’ counsel. Thus to assure that no repetition of such a farce should occur, the otherwise apparently unnecessary sentence was added to the appellate rule.

The impact of the Ohio Rules of Superintendence on the later rules draftsmanship is somewhat different. Here there were no federal rules to copy from, to improve upon, or to stultify with particular

64 FED. R. APP. P. 4 (a).
65 OHIO R. APP. P. 4(A), and OHIO R. APP. P. 4(B), unlike the corresponding Federal rules, use the same thirty (30) day measure for civil and criminal appeals. Formerly the statutory time for civil cases had been twenty days; for felony cases, thirty days; and for misdemeanor convictions in limited jurisdiction courts, ten days.
67 State ex. rel. Trustees of Kent State Univ. v. Emmer, No. 410 (Ct. App. 11, 1969). Hearing and oral finding were on April 22, 1969 as was the Notice of Appeal. The Journal Entry imposing sentence was filed on May 5, 1969; and Motion to Dismiss was filed on June 6, 1969, in the Court of Appeals.
68 The unpublished one page per curiam opinion cited two cases in support of its ruling on the motion. One of them, In re Fenwick, 110 Ohio St. 350, 144 N.E.269 (1924), had nothing to do with appeal time. The other case, State v. Avery, 119 Ohio App. 402, 200 N.E.2d 710 (1962), involved a deliberate choice by the appellate court to dismiss the appeal in preference to writing an elaborate opinion of affirmance which the court indicated it would otherwise have done — having considered the merits of the case.
paragraphs directed to the solution of minuscule problems. But there
was a borrowing involved, this time from Portland (Multnomah
County), Oregon and there was a concept to be borrowed, and if
possible improved upon: the use of the so-called unlimited individual
judge's docket, also used in many federal district courts. There was
also a measuring stick to be used: the maximum time or "norm,"
within which any given case of a particular type was expected to be
terminated, although not necessarily finally disposed of. 69

The concept of the "norm" time was apparently borrowed entirely
from Oregon since in the case of the United States district courts,
the Administrative office of the Courts which publishes statistics for
the system, 70 is primarily concerned not with the time for disposition
of the slow-moving cases, but with the duration of the median or
average case in a rather limited classification of case types. 71 Certain
of the Ohio Supreme Court's Rules of Superintendence were designed
to have an effect on the criminal rules, notably those rules dealing
with the permissible time span of cases. The Rules of Superintendence
had no drafting committee or staff as such, and the Supreme Court
of Ohio appears as the corporate draftsman. But the rules do have
an explanatory Implementation Manual appended as prepared by the
Director of the Ohio Legal Center, and in this sense the Ohio Legal
Center and the Administrative Director and his staff, may be regarded
as the committee for the purpose of explanatory notes and guides to
interpretation of what the Rules are intended to accomplish.

In terms of impact on criminal procedure, Superintendence Rule
1 sets the stage. Normally Rule 1 in any such series is a scope of
application statement, but in these rules the first rule contains the
following impassioned statement on the delay problem:

In an attempt to bring criminal cases to trial promptly,
it appears that more judges are being assigned to the crim-
inal branches of our larger metropolitan courts. One direct
result of this practice is to increase further the number of
civil cases pending in many of these courts. 72

The statement appears designed to justify the declaration of Rule 4
that all cases, civil and criminal, must be assigned individually to all
judges of the general division of a multi-judge court so that all such
judges would have an approximately equal number of both civil and
criminal cases assigned to them, effectively abolishing the criminal,

69 Rules of Superintendence Supreme Court of Ohio Rule 5 (Page Supp. 1972) refers
to cases "pending for a period of time exceeding that specified as the norm . . . ," but does
not specify any time. Report Form A, included in the Implementation Manual issued by the
Ohio Legal Center Institute, specifies the "norm" for each of six categories.
71 Median case pendency for civil and criminal cases are shown for each federal district by

Published by EngagedScholarship@CSU, 1974
equity, and civil jury trial divisions of the larger metropolitan courts. Unfortunately, while the first part of this Rule 1 statement was true, the second part relating to the backup of civil cases was only partly true. In the year 1969, at least half of the general duty bench was assigned to the criminal division in two of the larger counties of the state, with a corresponding decrease in the number of judges assigned to civil jury cases. Yet with fewer judges available for civil dispositions, the disposition rate in those counties increased slightly on a total basis, and quite sharply on a per judge basis. Logically this should not have happened, yet on the Administrative Director’s annual summary for that year, it did! The following year of 1970 proved to be a disaster in both civil and criminal dispositions. Most courts, and particularly the larger metropolitan courts, fell behind in the disposition of both classes of cases, thus prompting the heroic measure of imposing the individual judge’s docket as a cure. In any event the Superintendence Rules which give priority treatment to criminal cases, insure that not merely fifty per cent but one hundred per cent of the general duty bench will be occupied, at least part time, with criminal cases.

What the effect of more than doubling the number of judges dealing with criminal cases will be on the effectiveness of the Rules of Criminal Procedure is a matter of conjecture. Certainly there will be twice as many metropolitan judges trying to learn and apply themselves to the new procedures, all at the same time, and thus twice as many adjustments needed, with twice the opportunity for misinterpretation and error. If, as has been theorized, the disposition disaster of 1970 was partly caused by problems of the judges’ having to learn and interpret the then-new Rules of Civil Procedure, then a similar problem may have arisen in the last half of 1973 as all judges struggled to understand the new Criminal Rules, with the spectre of a new substantive criminal code to cause learning problems in the year 1974. It is entirely possible that instead of the Rules of Superintend-
ence having an effect on the criminal procedure rules, the reverse may be true, with both civil and criminal case dispositions falling off sharply to reduce the gains made in case currency since January 1, 1972.\textsuperscript{77} Nor would this be merely a short term effect, since recent studies have indicated that even after three years of experience by judges with the civil rules, the time span for disposition of personal injury cases has not recovered from the 1970 low, nor regained even the 1968 level of dispositions.\textsuperscript{78}

A second effect of the Rules of Superintendence on criminal procedure, as laid down in the new rules, is that of the establishment of dispositive norms under Rule 5 and made definite in Reporting Form A incorporated into the rules. The “norms” established by the reporting form were twenty-four months for personal injury cases, six months for criminal and appropriation cases, and twelve months for workman’s compensation and all other cases.\textsuperscript{79} While the meaning of the term “norm” is unclear, it appears to represent the maximum time from filing (or arraignment) that a case should be allowed to pend without the recital of special reason from the judge to whom the case was assigned. During the year 1973 it was strongly indicated that the norm time for criminal defendants held in custody should be reduced to three months.\textsuperscript{80} The effect of the norm, if enforced, is not only to give the criminal cases the clear preference they should have with every judge, but to clear up a very serious omission made in Criminal Procedure Rule 12 as drafted. The rule requires not only that certain objections and defenses be raised before trial, but that they should be made by motion within thirty-five days after arraignment.\textsuperscript{81} It was apparently felt that with such a tight time span for motion filing, the following language of Uniform Traffic Rule .11 was unnecessary:

\begin{quote}
... where possible all such motions shall be made at the same session of court or stated in writing in a single document, to the end that successive motions will not be offered at successive appearances for the sake of delay.\textsuperscript{82}
\end{quote}

\textsuperscript{77} The gains as shown by Report of the Chief Justice, 46 OHIO BAR 755, 756 (1973), were spectacular, with a reduction in criminal cases pending of 2356 cases in a one year period. Figures published by the Administrative Director for the same period appeared to show an actual increase in the number of cases pending over the same period, 16 OHIO COURTS, 1972 Summary, at 20. For reconciliation of the two sets of figures see France, supra note 76.

\textsuperscript{78} See the table entitled Composite Performance Chart Tort Case Filings to be found in France, Order in the Courts Revisited, 7 AKRON L.REV. 5, 29 (1973).


\textsuperscript{80} Address of the Chief Justice, Supreme Court of Ohio, Ravenna, Ohio, March 5, 1973; Report of the Administrative Judge, Common Pleas Court, Cleveland Plain Dealer, March 1, 1973, at 9.

\textsuperscript{81} OHIO R. CRIM. P. 12 (C) provides an exception for bills of particulars (Rule 7 (E); and for discovery motions (Rule 16(F), both of which provide that the motion shall be made within twenty-one days after arraignment, or as in Rule 12, seven days before trial.

\textsuperscript{82} 12 Ohio St. 2d XV (1967).
As far as the movants were concerned, the consolidation of motion language was probably unnecessary, but so far as some judges are concerned a series of motions filed at different times invites a series of separate decisions, also made at different times. There is a real fear that some judges will wish to string out their motion decisions over a long period of time, hearing argument on the second motion only after the first has been decided, and so on. Weeks could be consumed in such a process and it should be noted that no time limits are placed on decisions in preliminary matters. Thus the "norm" time, if strictly enforced, may become a needed whip to force the abandonment of piecemeal decision-making on motions which would otherwise delay the time of trial. If not enforced strictly, the seriatim disposition of pre-trial motions may present a serious problem in promptness of decision.

The Drafting Solutions — 1972

Viewed against the backdrop of existing Ohio felony case handling, the changes imposed by the Rules of Criminal Procedure are almost monumental. At least two thirds of the rules themselves are worthy of extended comment. But considered as the draftsman's problem of selection of sometimes conflicting ideas expressed among the models available to them, the changes produced by selection, combination, or rejection of all, were far fewer in number. The models available were, of course, the Federal Rules of Criminal Procedure, which furnished the skeleton and numbering system; the Ohio Rules of Civil Procedure, as a basis of some alternatives to the federal plan and to accommodate the prejudices of local attorneys; the modernizing influences of the 1959 amendments to the arrest, preliminary hearing, and trial of misdemeanors statutes; and finally, for what their limited field of application was worth, the so called Uniform Traffic Rules. The processes of selection, combination, and rejection produced only three major changes of substance, two minor ones, three curious provisions adding to the time span for case processing, and ten lengthy additions of detail, some of which were mere borrowings from statutory language to preserve the familiarity of the bar with the vocabulary of the criminal process. The balance of the changes, based upon the model of the Ohio Civil Rules, were dubious efforts by extra language to provide a specific cure for each minor

83 This contrasts with OHIO REV. CODE ANN. §2937.21 (Page Supp. 1972), which specified: "No continuance at any stage of the proceeding, including that for determination of a motion, shall extend for more than ten days . . . ," and with OHIO REV. CODE ANN. §2938.11 (F) (Page Supp. 1972) which reads: "Any finding by judge or magistrate shall be announced in open court not more than forty-eight hours after submission of the case to him."
shortcoming in existing practice or for each manifested bad habit among the existing bench and bar.

**Major Changes of Substance**

One of the more logical and generally approved major changes in the approach of the new rules is that expressed in Rule 5, abolishing arraignment before the magistrate as such, and forbidding the taking of pleas at the initial appearance in a felony case. The decision was necessarily a choice between the express requirements of Federal Rule 5 (c) and the equally express requirements of Section 2937.06 of the Ohio Revised Code, enacted in 1959. However modern the statutory provision may have appeared when it was approved by the Ohio State Bar Association in 1958, and however desirable the end it was to subserve in making the initial appearance a meaningful and critical part of the criminal process, thus necessitating appointment of counsel for the indigent at that stage, the requirement of entry of plea brought too many disadvantages without bringing assigned counsel any closer to being provided in that stage of prosecution. The advances in the 1960's in liberal thinking, with *Mapp*, *Beck*, *Wade*, *Miranda*, and their extensions, made the statute a curious anachronism, and what may have seemed a promising, if devious, approach to a desirable end in 1958 was simply not tolerable by 1972. The provision for a plea of guilty before the committing judge, for which this author was at least partly responsible, should die unmourned. Another portion of the same statutory revision, Section 2937.02 of the Ohio Revised Code, has survived in the Rules in almost its original verbiage at Rule 5 (A)'s first cautionary information to the defendant. Still others, the finding on waiver, the

---

84 *Fed. R. Crim. P. 5 (c)* provides: "... the defendant shall not be called upon to plead ...," and *Ohio Rev. Code Ann. §2937.06 (Page Supp. 1972)* provided: "... the court or magistrate shall require the accused to plead to the charge. In case of felony only a plea of not guilty or a written plea of guilty shall be received ..."


90 While the detail of the rights explained was rearranged in the rules, the only substantial addition is in Rule 5 (A) (2) providing for assigned counsel at the preliminary hearing level; *see note 85 supra*.

91 *Compare Ohio R. Crim. P. 5 (B) with Ohio Rev. Code Ann. §2937.09 (Page 1960).*
order of proceedings at the hearing,\(^\text{92}\) the second cautionary instruction,\(^\text{93}\) and the statutory definition of probable cause for the purposes of grand jury certification,\(^\text{94}\) have been retained in the Rules as against brief and rather elliptical language in Federal Rule 5 (c). A final modification of the statutory procedure,\(^\text{95}\) which was criticized at the time of its adoption as entirely too loose, extends the time limit in some cases for holding the preliminary hearing.\(^\text{96}\)

A second major change involving departure from and rejection of existing statutory law, the Federal Rules of Criminal Procedure, and even the Traffic Court Rules, permits and encourages objections to the form and substance of an indictment to be made after arraignment and plea instead of being waived by the plea itself.\(^\text{97}\) While the change is defended as encouraging the defendant to consolidate all motions, including those in abatement, in bar, for the suppression of evidence, and for discovery, curiously there is no provision similar to that of Federal Rule 12 (b) or of either the Ohio or Federal Rules of Civil Procedure or even of Uniform Traffic Rule .11,\(^\text{98}\) effectively requiring the joinder of all then-available motions without regard to consistency. Instead, different time deadlines for filing the various motions are set,\(^\text{99}\) and it has even been suggested by commentary at familiarization lectures on the rules that a motion to suppress evi-


\(^\text{95}\) Former \textit{Ohio Rev. Code Ann.} §2937.21 (Page Supp. 1972) provided that no continuance "shall extend for more than ten days unless both the state and the accused consent thereto. Any continuance or delay in ruling contrary to the provisions of this section shall, unless procured by defendant or his counsel, be grounds for discharge of the defendant forthwith." Under former §2937.02 (1953), postponement of the hearing more than ten days had the legal effect of a dismissal for want of prosecution. The change was commented upon in Meletzke, \textit{The New Preliminary Examination in Ohio: A Historical Contrast}, 20 \textit{Ohio St. L.J.} 652, 662 (1960).

\(^\text{96}\) Rule 5 (B) (1) shortens the time to five days if the defendant is in custody, but lengthens it to fourteen days if he is not. In addition the rule provides: "In the absence of such consent by the defendant, time limits may be extended only as required by law, or upon a showing that extra-ordinary circumstances exist and that delay is indispensable to the interests of justice."


\(^\text{98}\) Compare \textit{FED. R. CRIM. P.} 12 (b) (3): "The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter . . .," with \textit{FED. R. CIV. P.} 12 (b) and \textit{Ohio R. Civ. P.} 12 (B), which both provide: "A motion making any of these defenses shall be made before pleading if a further pleading is permitted." \textit{See also Uniform Traffic Rule .17 (e)} . . . The entry of such appearance and plea shall constitute a waiver of motions pursuant to Section 2937.06 Revised Code and Rule .11 as fully as would a plea entered in person in open court.

\(^\text{99}\) \textit{Ohio R. Crim. P.} 12 (C) sets thirty-five days after arraignment or seven days before trial for ordinary motions. Rule 7 (E) and 16 (F) set the time at twenty-one days after arraignment for bills of particulars and discovery motions, respectively.
dence cannot be made before arraignment and plea.\(^{100}\) The utility of permitting a defendant to raise technical objections to the form and substance of a charge after he has pleaded to that charge is not clear. It patently runs counter to normal pleading order under the concepts of both the civil and criminal procedural rules, and of statutory or code pleading, civil and criminal. It gives rise to a rather peculiar use of a non-bargained plea of no contest, permitting appeal therefrom after failure of any motion,\(^{101}\) and it is doubtful that any time of pendency of a criminal case will be saved thereby. This provision must stand as one of the more questionable provisions for Ohio.

The last of the 1972 major changes of substance are those found in Rule 23, dealing with both jury and non-jury trials. As to the jury trials, the rule rather arbitrarily fixed the number of jurors in felony and serious misdemeanor trials at nine, and for petty offenses at six, in contrast to the traditional twelve. Granted the permissibility of this approach under recent decisions relating to southern states which have generally retained smaller juries for misdemeanor trials in single court or minor court proceedings,\(^{102}\) it would seem to be courting a constitutional argument to reduce the number of jurors from the number traditionally required, as was proposed. While the obvious reason was to save expense and time in the jury selection process, which was the expressed motive in *Halliday*,\(^{103}\) it would seem doubtful based on the Pabst studies in the District of Columbia\(^{104}\) that any substantial amount of time would be saved; and the experience in the Southern District of Ohio\(^{105}\) gives rise to some question as to any monetary savings achieved by the reduction device. As to non-jury trials, the provisions of Rule 12 (c) that the court may make a general finding only, in contrast to the federal practice, seems reminiscent of the previously discussed provisions of Ohio Civil Rule 49 (c) forbidding special verdicts in jury cases. Whether this is part of a general effort to impose parochialism as against a federal rule

---

\(^{100}\) *Discussion of attorney Swartz on Ohio Rules of Criminal Procedure, publication 82-73, Ohio Legal Center Institute, 4.05 - 4.09, Youngstown, July 26, 1973.*

\(^{101}\) *Ohio R. Crim. P 12(H).*


\(^{103}\) Cleveland Ry. v. *Halliday*, 127 Ohio St. 278, 281, 188 N.E. 1, 2 (1933).


\(^{105}\) *Jury Utilization Studies, Five Midwestern U.S. District Courts*, I.J.A. (1972) (unpublished). Findings were that procedures of the clerk in determining numbers of jurors to be summoned for twelve member panels were so tight that it was unlikely that financial savings could be effected by reducing the number of jurors to be seated. Nonetheless, the district, in the fall of 1972, adopted six member juror panels for civil cases.
example, or is merely designed to protect the Ohio judges from getting into trouble by getting ill-considered and press-pleasing reasoning into the record on appeal, is not really known.

It should in fairness be pointed out, however, that when Ohio devised rules covering venue as well as in person jurisdiction in civil cases, it seems to have exhausted its desire for pioneering and to have returned in the Criminal Rules to the traditional standoff attitude of the federal rulemakers, evidenced by referring the question of venue for criminal prosecution to statutory control.

**Minor Departures.**

Among the minor departures of substance is the provision in Criminal Rule 3 that the complaint, or basic charging document, may be sworn to before any person entitled to administer an oath. Coupled with the provision of Rule 4 that the warrant may be issued by the judge, clerk, or officer of the court designated by the judge, the procedure varies widely from the federal model which limits the power to take the oath to a commissioner or other officer "empowered to commit persons charged." Such looseness is also a departure from the apparent limitations of the 1959 reformed statutory procedure which seemingly limited the oath taking to a magistrate or the clerk of a court of record. For a time in the 1960's there was serious concern that even extending the oath-giving authority to clerks who were untrained in the law was inviting constitutional attack on the affidavits. A warrant based on the complaint could not be issued without a preliminary finding of probable cause and the clerks as both oath takers and warrant issuers were deemed incapable of making a probable cause finding. Since the number of minor offenses for which warrants could be issued is vastly greater in the state's limited jurisdiction courts than before U.S. Commissioners and federal magistrates, it was considered impractical for the limited jurisdiction judges to handle such an imposing number of complaints. The problem was complicated by the fact that the overwhelming bulk of non-traffic offenses are committed, and suspected perpetrators are identified or apprehended, after the normal daytime court of record hours. Nor did Ohio want any part of using second class "assistant" judges or the rotation of limited jurisdiction judges to night duty at police sta-

---

106 See text at notes 33-44 supra.

107 OHIO R. CRIM. P. 18(A).

108 FED. R. CRIM. P. 3.

109 OHIO REV. CODE ANN. §2935.09 (Page Supp. 1972). The author's experience as a municipal judge included some jousting with attorneys for complaining witnesses, even after 1959, who insisted on their rights to take the oath to a criminal affidavit and present the completed affidavit to a deputy clerk with a demand for issuance of an arrest warrant.
The solution briefly hit upon was that of "an officer of the court designated by the judge" to take the oaths and issue the warrants after court hours. The term as devised was the equivalent of the southern "learned in the law" description of a person admitted to the bar, and it was seriously contemplated by the rules draftsmen in 1971 that a corps of lawyers might have to stand by at the Clerk's offices or police stations to take over the drudgery of oath taking, determination of probable cause, and warrant issuance. Before even the rules submitted in 1972 had run their gauntlet before the General Assembly, however, the United States Supreme Court had decided in *Shadwick v. Tampa*,\(^{111}\) that a clerk could be trusted to be a warrant-issuing authority. The decision was followed by the Ohio Supreme Court in *State v. Fairbanks*,\(^{112}\) and the emergency device of the officer of the court was rendered unnecessary and the clerk restored to both his oath taking and warrant-issuing functions. Both the "any person authorized to take oaths," and the "officer of the court" provisions were retained in the rules, however without real need and solely as a matter of convenience.

A second minor departure from the existing models was the creation of a "no contest" plea for felonies as the apparent equivalent of the federal *nolo contendere*, and the identically translated no contest plea for misdemeanors, (particularly traffic offenses) in the 1959 statutory revision. Unfortunately, it has different incidents and consequences from those of either of its models. The 1959 statutory draftsmen had in mind a form of plea which would foreclose entering a defense to the charge, without at the same time being an admission against interest or a collateral estoppel to deny civil negligence per se in a typical automobile collision episode. As an alert commentator pointed out at the time, the misdemeanor plea resembled the old English "non vult" pleas much more than it did "nolo contendere."\(^{113}\) Some of the incidents of the misdemeanor plea were thoroughly misunderstood by the practicing bar and the limited jurisdiction bench. But under Criminal Rule 11, unlike Section 2937.07 of the Ohio Revised Code, the entry of the plea is an admission of the truth of the facts alleged in the complaint although not usable as such in subsequent civil or criminal proceedings. The chief use of the "no contest"

\(^{110}\) Both practices are prevalent in Tennessee, the former in Nashville, the latter in Memphis and Knoxville. See *Effective Minor Courts: Key to Court Modernization*, 40 *Tenn. L. Rev.* 29, 45-46 (1972-1973).

\(^{111}\) 407 U.S. 345 (1972).

\(^{112}\) 32 Ohio St.2d 34, 289 N.E.2d 352 (1972).

plea in a felony case would appear to be as a switch plea after the failure of a defendant to gain dismissal of a complaint or the suppression of evidence on a pre-trial motion. The third minor variance from the existing Models is the inclusion in Rule 43 of an additional subsection, permitting trial in the absence of the defendant where his actions in the courtroom had been disruptive and his removal ordered to permit trial to proceed in orderly fashion. Such an addition is merely good sense and anticipates a similar addition to the Federal Criminal Rules.

**Time Standards**

The lengthening of permissible time spans allowed for certain individual actions is a puzzling feature of the new rules, which were first being devised at the same time that the Supreme Court itself was preparing the Rules of Superintendence with their Rule 1 reference to delay in criminal cases as the most pressing problem of the courts. The principal opportunities for a more leisurely approach, apart from those of pre-trial motion practice previously discussed, were in the area of new trial and arrest of judgment. Just why in such cases it should be expected to take an Ohio lawyer twice as long to reach his county seat courthouse as it does for him to reach the more distant federal courthouse is not clear, nor is it clear how it comports with the statements of Superintendence Rule 1. The problem seems similar to the problem already discussed of additional time allowances to the prosecutor in proceeding with a preliminary hearing in felony cases. It is to be assumed, however, that since the drafting committee for the Rules consisted primarily of prosecutors and defense counsel, a compromise allowing each more time for his particular problem was agreed upon, and the Supreme Court merely approved the compromise without inquiring into its motivation. There is, of course, precedent in the Ohio Rules of Civil Procedure for allowing such additional time, which is equally inconsistent with the "hurry up" spirit of the Superintendence Rules.

---

114 See Ohio R. Crim. P. 12(H).
115 Ohio R. Crim. P. 43(B).
116 "Delay in both criminal and civil cases is presently the most serious problem in the administration of justice in this state . . . ." Ohio Superintendence Rule 1 (A).
117 See text at notes 96-100 supra.
118 Ohio R. Crim. P. 33 (B) New Trial — allows fourteen days for filing the motion, in contrast to Fed. R. Crim. P. 33 (seven days). Similarly, Ohio Rule 34 allows fourteen days for motion in arrest of judgment and Federal Rule 34 allows seven days.
119 See text at note 96 supra.
120 See Ohio R. Civ. P. 12(A) (1) and (2) allowing twenty-eight days for a responsive pleading or motion in contrast to Fed. R. Civ. P. 12(a)'s twenty days.
The Prolixities

The seemingly endless adding of words on words, and then of repeating them in different contexts, is the most striking feature of the Criminal Rules as formulated. It should be observed, however, that there are no obvious Hudzik\textsuperscript{121} or Emmer\textsuperscript{122} additions to cure specific mistakes of the past. Rather, the volume of prose and its repetition seems to be inspired by the fear that in presenting new concepts to Ohio, unless they are dinned into the judges, defense lawyers, and prosecutors, they will be overlooked and the old habits revived at every possible opportunity. This is particularly true of the new approaches to pre-trial release, voluntary initial appearance, discovery, and the always hard limitations for police to absorb: search and seizure.

In the area of pre-trial release there is some mistaken thought that Ohio, led by Cuyahoga County, has hit upon a revolutionary idea which requires the abundance of verbiage given to it by Rule 46. This is, of course, the acme of parochialism. The elimination, or at least the downgrading in importance, of the professional bail bondsman comes as a result of an experiment begun in this country with the work of the Vera Foundation in New York many years ago. The term "release on recognizance" without intervention of the compensated professional surety is a long accepted one in Philadelphia, in many northern cities, and in whole large areas of the southeast. It is only in the volume of language used to describe the process that Ohio could be said to be a leader. Some of the detailed language in Rule 46 appears to be necessary to prevent anticipated abuse, as in the case of the clear command that misdemeanor defendants be released on their own recognizance or a personal unsecured bond in all but extraordinary cases. The impulse of many metropolitan police to use a misdemeanor as a mere holding charge, while investigating the defendant for a more serious one, has a long history in Ohio, and firm, detailed, rules are probably necessary to break the habit. In addition, the nature of control that many municipalities exercise over the limited jurisdiction courts has fed their desire to make such courts a source of income, or at least an offset to increased police department budget drain. The volume of fines did not appear sufficient for this purpose and as an alternative to "cafeteria courts," many municipal courts drifted into the practice of taking cash bond for minor offenses in a sum substantially higher than any monetary penalty by way of fine.

\textsuperscript{121} Hudzik v. Alcorn, 4 Ohio St.2d 45, 212 N.E.2d 419 (1965), a situation subsequently dealt with by a special addition to Rule 8(H), OHIO R.CIV.P.

to be imposed, then winking at the practice of forfeiting this bail to avoid court appearance. It was good business but poor judicial public relations.

As to bail in felony cases, it seemed necessary in the rule to emphasize that bail was simply to insure the presence of a defendant at trial and not a device to protect the community from further harm or a pre-trial punitive measure. This emphasis was probably needed to cope with the express or implied criticism of the metropolitan press to which the occasional episode of a man released on bail for one offense, who then proceeds to commit another, represents not only good reading for its subscribers but an object lesson on the softness of courts to criminals. Limited jurisdiction judges are apt to be highly impressed by such newspaper stories, and as a result bail has frequently been set at a level to insure retention of the defendant in jail rather than to permit his release.

There is similar emphasis in the provisions of Rule 4, which relates to the substitution of a summons for a warrant of arrest in cases of responsible citizens who have nothing to gain from flight to avoid appearance in court to answer minor charges. Part of the problem is that some police agencies, distrustful of the courts' policy of probation, suspended sentence, and small fines, have hit upon pre-hearing incarceration as an addition to such sentences in order to insure that the misdemeanant "knows he's been in trouble." An illustration of such an attitude, even after the effective date of the rules, was insistence upon the arrest and "booking" of the mayor of Cleveland for a rather technical assault complained of by one of his policemen in July, 1973. Judges, particularly those of municipal courts, also contribute to the abuse of the arrest process in such cases. As a matter of the administration of the court, if not justice, it is easier to have defendants hustled into the courtroom as prisoners than to go through the experience of voluntarily appearing defendants, who frequently arrive late or not at all.

To cure these influences it was deemed necessary to state the preference for summons over warrant issuance, and to emphasize repeatedly that preference in Rule 4 so that clerk, judge, and policeman may opt for summons. In one respect the use of the term "summons," no matter who issues the document, is an important improvement on the old procedure. In the 1959 statutory amendments it was felt that a summons was necessarily a document to be issued by a court, not an enforcement agency, and that there might be insufficient compliance with all summonses if some were issued by police. Consequently the term "Notice to Appear" was used to describe the officer-issued summons. The new language represents a distinct improvement.

Another example of additional language in relation to the corresponding federal rule is that found in Rule 10 governing arraign-
ment. Here once more there is a statement to the defendant of his rights, in almost the identical language given him on initial appearance in the limited jurisdiction court. Out of excess of caution there is added to this rule the requirement that the defendant must be present unless, as borrowed from Rule .16 of the Traffic Rules, all concerned consent to his absence and a "not guilty" plea is entered. Much of the explanation of rights is repetitive as to the desirability, if not the necessity, of having counsel. As to assigned counsel for the indigent, Rule 44 on two occasions uses the Supreme Court's constitutionally-required adverbs, "knowingly, intelligently and voluntarily" with respect to the defendant's waiving counsel. In addition, Rule 44 repeats the substantive rule that no confinement may be imposed for a petty offense without the defendant's being represented by, of having waived, counsel.

Verbosity reaches a high point in Rule 16, governing discovery. The federal rule, detailed in itself, takes 86 lines of type, but the new Ohio rule, in an effort to improve on the model, takes nearly 200 lines to say virtually the same thing. Much of the additional language is needed, it will be claimed, because of Ohio's new theory that the defendant, by exercising discovery as to the case against him, subjects himself to disclosure of similar evidence from his own file. It is true that discovery within certain limits is reciprocal, but the Ohio rule is different from the federal one only in degree. The latter is explicit on exchange of reports and records and draws the line of non-disclosure just short of data on witnesses, which Ohio now permits as a matter of reciprocal discovery. It is really only in this rule that the Ohio solution is not merely a guide but an exceedingly detailed blueprint, so full of stated conditions and prerequisites that there is danger of being bogged down in the detail of the conditions. Similarly Rule 7, relating to the details of waiver of indictment, is much more labored and detailed than in the corresponding federal rule. The rule is most detailed and specific as to those amendments of the indictment or information which relate to the substance of the charge, even if they are made during trial, and as to the want of jeopardy if the jury is required to be discharged by reason of the amendments.

The final wordy rule is that relating to search and seizure — Rule 41. Here is an amalgam of the federal rule, bits and pieces of the prior Ohio statute modeled on it, an effort to update and enlarge the definition of objects of search, and a reworking of the United States Supreme Court decisions, notably Hayden. Any such combination is

124 OHIO R.CRIM.P. 41 (B).
certain to result in increased verbiage, and considering this, the Ohio rule was kept in reasonably short compass. Additions to the federal rule language are in section (B) opening up the objectives of search; the Ohio case law additions appear in section (C) which requires a statement of the factual basis for affiant's belief that the property is at the location to be searched, but permits so-called reliable hearsay to be used, as in Rule 4, relating to arrest warrants. The Ohio statutes are also reflected in section (C) for the examination of the affiant and additional witnesses by the issuing judge, and by the provision for a record of that testimony. Some material correcting the statutes is also contained in subsection (D), clearing up the matter of whom may hold the evidence seized, pending trial of the case to which it relates.

Notwithstanding some of the additions called for in trying to combine federal rules, detailed Ohio statutes, reasonably current United States Supreme Court decisions, and the current philosophy of the Ohio Supreme Court, the end product of the Ohio Rules of Criminal Procedure is less bulky in additions of useless language than might have been expected with such a conglomeration of ideas. In this department the criminal rules are a decided improvement upon the three-year-old Ohio Rules of Civil Procedure.

The 1973 Changes

During the 1972 legislative session, the General Assembly of Ohio rejected the Rules presented to it by the Court, thus giving additional time for redrafting. Neither the reasons for the rejection nor the text of the changes the Assembly desired, nor the concessions the Court was reportedly willing to make to get the Rules adopted, were ever made a matter of official record. Reportedly the legislators were principally concerned about the pre-trial release provision, Rule 46, with its "soft on criminals" approach, which was sometimes translated as the yielding of the legislators to the pressures of the professional bail bondsmen. The rules as resubmitted in January, 1973, did contain some changes dealing in detail with, or correcting oversights in, the previous offering. Significantly, however, on the point of friction, the Court did not yield an inch on the conditions of pre-trial release. The 1973 version of Rule 46 was more hard-line liberal than its predecessor.

The redrafting produced only fifteen changes in the rules of any significance; six were on matters of real substance, seven were essentially additions of more detail and verbiage, and two were corrections by adding subjects first omitted, probably by oversight.

Of the matters of substance, the principal changes were in downgrading the importance of formalities in the case of misdemeanor prosecutions. The most striking of these changes was the elimination
of the provision in earlier Rule 46 that a policeman could prevent unsecured pre-trial release of a defendant merely by filing a written objection to it—a rather craven abdication of the right of the courts to pass on conditions of release. For this provision was substituted an elaborate subsection (D) providing for the ten per cent bail deposit, a cash deposit or guaranteed arrest bond in accordance with a misdemeanor bail schedule (all borrowed from the 1959 arrest and detention amendments),\(^{126}\) or provision for credit card bonding. Allied to this provision was an alternate citation procedure, set forth in Rule 4.1 for non-traffic misdemeanors, which essentially extended the Uniform Traffic Ticket procedure to non-traffic offenses. Another borrowing from the Uniform Traffic Rules occurred in Rule 10, relating to the presence of a defendant at his arraignment. The history of the traffic rules had featured a determined attempt to break up the entry of guilty pleas and payment of fines for the defendant by others,\(^{127}\) culminating in adoption of Rule .19. Apparently the rule draftsmen in 1972 were convinced that this problem also existed in non-traffic offenses, so Rule 9 (B) was added, requiring the presence of the defendant at arraignment unless a “not guilty” plea was entered.

Two potentially contradictory changes were made in the 1973 submissions with regard to the formalities of writing. In Rule 44, as resubmitted, the provision for written waiver of counsel was eliminated, although the other safeguards against pressure on a defendant were not relaxed. But at the same time the provisions in Rule 31 regarding return of verdicts was redrawn to re-institute the statutory requirements that a verdict must be in writing and signed by each juror concurring therein.\(^{128}\) Finally a provision was made in Rule 32.2 that a copy of the report of presentence investigation of a defendant should be transmitted to the agency exercising supervision or confinement after his sentence.

There will be reasonable differences of opinion on whether the number of jurors sitting on a defendant’s case, or the number of challenges allowed, constitute matters of form or of substance. This author chooses to regard them as matters more of form and detail. While the draftsmen in Rule 24 (A) repeated the questionable provision of the unqualified right to romance the jury panel on voir dire in both the 1972 and 1973 submissions,\(^{129}\) they displayed more abandon in toying


\(^{127}\) The history of the problem is recited in France, The Ohio Supreme Court’s Traffic Court Rules: A Beginning of Procedural Rule-Making, 1 AKRON L.REV. 1, 12-13 (1968).

\(^{128}\) The provision contained in OHIO REV. CODE ANN. §2315.09 (Page 1954): “The verdict shall be in writing and signed by each of such jurors concurring ...” had previously been accepted as controlling the form of criminal as well as civil verdicts, although before the 1950’s a verdict signed by the foreman only, subject to a poll of the jury, had been accepted by many courts, by form books, and incorporated in many standard charges of the court.

\(^{129}\) See note 50 supra.
with the number of jurors in both submissions. The 1972 offering had reduced the number of jurors in felony and serious misdemeanor cases to nine and in petty offenses to six. The 1973 version of Rule 23 (B) returned to twelve jurors in felony cases and eight for all misdemeanors, in the latter case a reasonable compromise on a point of not too much consequence. But Rule 24 (C) raised another distinction between felonies and misdemeanors by authorizing four peremptory challenges for the former and only three for the latter, another great decision of less than cosmic consequence.

Other matters which were changed include the elimination of a juror's belief in capital punishment as a ground of challenge for cause (Rule 24), expansion of the right to assigned counsel in parole revocation hearings (Rule 32.3), some added detail on discovery (Rule 16), the insertion of a provision for authorization of any officer to take the verification of a complaint (Rule 3), an expansion of the definition of records required to conform to the Rules of Superintendence (Rule 55), and a new provision giving express recognition to negotiated pleas and requiring a record of the conditions thereof, (Rule 11). In the correction of prior oversight, there appeared two new rules of varying importance. One, Rule 27, provided reference to the Rules of Civil Procedure for proof of records. The other, Rule 21, correcting an omission in the civil rules themselves, provided for the transfer of trial of misdemeanor cases to limited jurisdiction courts.

Conclusion

While the length and verbosity of the new Rules of Criminal Procedure may be criticized by some, much of the length is necessary because police agencies and limited jurisdiction judges seem to require that all "don'ts" be spelled out in considerable and unmistakable detail, as experience in the operation of the Uniform Traffic Rules indicates. In general, the Rules should prove workable; moreover, the draftsmen have refrained from the excessive parochialism which has marred the Rules of Civil Procedure.

One caution is entered, however. It seems curiously inconsistent with the spirit of the Rules of Superintendence to allow twice as much time for the filing of motions in arrest of judgment and for new trial,
and *three times* as long for an appeal in a criminal case, as is allowed under the federal rules. In addition, the importation of the "seasonally so as not to delay trial" concept as a pretended limitation on delay in the disposition of preliminary motions (which replaced the express time requirements of the Criminal Procedure Act), the extension of time allowed for preliminary hearings, and the failure to provide for consolidation of pre-trial motions, may have serious effects in delaying criminal adjudications. These provisions may prove to be the culprits if, as may occur, there is a slowdown in late 1973 and 1974 in criminal case processing resulting from the adoption of the rules.

122 For motions for new trial and in arrest of judgment, see note 118 supra. The extra time allowance for notice of appeal is in OHIO RULES APP. P., 4(B), allowing thirty days, in contrast to FED. RULES APP. P. 4(b), ten days.