REFORMS IN THE BUSINESS AND OPERATING MANNER OF THE OHIO COURTS OF APPEALS

by

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I. INTRODUCTION

LIKE INTERMEDIATE APPELLATE courts in many other American judicial systems, the Ohio courts of appeals provide the avenue for review of trial court decisions for nearly all Ohio litigants. And, as in many other American judicial systems, these courts are in the midst of a growing crisis caused by increased case filings unaccompanied by sufficient increases in state support. In the next few years, the Ohio courts of appeals will be compelled to develop new methods of performing their appellate review tasks simply to stay afloat.

Necessity has already prompted intermediate appellate courts outside Ohio to explore new techniques for handling caseload pressures. While some of these techniques have proven quite successful, others can at best be characterized only as noble experiments. In seeking ways to cope with their caseload crisis, the Ohio courts will be able to draw upon these experiences.

This article will review, and comment upon, some of the techniques available to the Ohio appeals courts. The task of preparing this article was facilitated greatly by the many Ohio appeals court judges who responded to a survey letter, reproduced in the appendix, sent by the authors in the Summer of 1981. The results of this survey are incorporated in the following pages, though we are confident they do not represent the judges’ last words. To promote further dialogue, we have deleted references to the names of the particular judges whose remarks are noted, and have instead assigned each judge an identifying number.

This work contains three major sections. First, the article demonstrates the need for some reform in the Ohio courts of appeals. Second, reforms in the business of the Ohio courts of appeals are suggested. Such reforms would alter the longstanding policy of “one trial, one review” by making certain appellate jurisdiction subject to the appellate courts’ discretion. Third, possible reforms in the operating manner of the Ohio appeals courts are examined. This section is divided into three significant parts, which discuss possible reforms during the prehearing, hearing, and posthearing stages of an appeal. While the views expressed within this article are at times tentative, hopefully they will nonetheless be found worthy of consideration and in some small way aid the

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courts of appeals in discovering ways to cope with the growing crisis.

II. THE OHIO COURTS OF APPEALS: THE NEED FOR REFORM

A. Subject-Matter Jurisdiction

The present Ohio courts of appeals originated with the district court established under the state constitution of 1851, though their contemporary form seemingly first appeared with the 1883 amendments to that organic law. The district court was given "like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law," but this jurisdiction was transferred to the new circuit court created in 1883. Unlike the district court, which was "composed of the judges of the court of common pleas of the respective districts, and one of the judges of the supreme court," the circuit court "was presided over by judges elected to serve on that court."

Courts of appeals were created in 1912 when constitutional change placed judges of the circuit court in the courts of appeals. The new appeals courts had original jurisdiction similar to that of the supreme court and appellate jurisdiction as may be provided by law. Yet, unlike either the earlier district or circuit court, the courts of appeals possessed constitutionally mandated appellate jurisdiction over "the trial of chancery cases." The new courts of appeals were to operate in eight "appellate districts of compact territory bounded by county lines," and each was to include three judges. Since 1912, the number of appellate districts has gradually risen so that there are now twelve districts and the appellate jurisdiction in the trial of chancery cases has been eliminated.

1 The creation of the district court has been characterized as "the first attempt in Ohio to create an intermediate reviewing court." Skeel, Constitutional History of Ohio Appellate Courts, 6 CLEVE.-MAR. L. REV. 323, 325 (1957).
2 OHIO CONST. art. IV, § 6.
3 OHIO CONST. art. IV, § 6 (1851, amended 1883).
4 OHIO CONST. art. IV, § 5.
5 Skeel, supra note 1, at 327.
6 OHIO CONST. art. IV, § 6 (1851, amended 1912).
7 OHIO CONST. art. IV, §§ 2, 6 (1851, amended 1912).
8 OHIO CONST. art. IV, § 6 (1851, amended 1912).
9 Id.
10 Id.
11 Compare OHIO CONST. art. IV, § 6 (1851, amended 1912) with OHIO CONST. art. IV, § 6 (1951, amended 1944), OHIO CONST. art. IV, § 6 (1851, amended 1959) and OHIO CONST. art. IV, § 3 (B)(2)(adopted May 7, 1968).
In many ways the constitutional underpinnings of the Ohio courts of appeals’ current jurisdictional authority are similar to those of the United States Supreme Court. Each court is mandated to possess original jurisdiction in certain types of cases, and such trial authority seemingly is both nonexclusive and immunized from legislative alteration. Further, each court apparently has only such appellate jurisdiction as is legislatively established.

Statutory provisions on the appellate jurisdiction of Ohio appeals courts are, however, quite different from those relevant to the United States Supreme Court. The general statutory grant of appellate jurisdictional authority to the Ohio courts of appeals indicates these courts “shall” have jurisdiction “upon an appeal upon questions of law to review . . . orders of courts of record inferior to the courts of appeals within the district . . . for prejudicial error committed by such lower court.” The statute also indicates that review is appropriate on questions of fact in certain classes of actions upon appeal. Effectively, every case in an Ohio court of record is eligible for the courts of appeals, thereby establishing a right to have reviewed each trial proceeding. In contrast, the United States Supreme Court possesses mandatory appellate jurisdiction in only selected cases, with discretionary review available in other cases. Not surprisingly, the United States courts of appeals possess statutory appellate jurisdictional authority similar to that of their Ohio counterpart, though comparable federal constitutional underpinnings are absent.

Because the Ohio General Assembly has continued to recognize the need for several general trial courts, there is a variety of sources from which ap-

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13 See U.S. Const. art. III, § 2, cl. 2; Ohio Const. art. IV, § 3(B)(1).
14 The Ohio Court of Appeals possesses original jurisdiction over cases also subject to Ohio Supreme Court’s original jurisdictional authority, Ohio Const. art. IV, §§ 2(B)(1)(a)-(f) and 3(B)(1)(a)-(f), while much of the U.S. Supreme Court’s original jurisdictional authority parallels that of the federal district court, Illinois v. Milwaukee, 406 U.S. 91 (1972).
16 See U.S. Const. art. III, § 2, cl. 2; Ohio Const. art. IV, § 3(B)(2).
18 Id. But see Ohio R. App. P. 2; A. Whiteside, Ohio Appellate Practice § 1.17 (1981). The statutory provision on review of questions of law and fact may serve as only a reminder that no de novo review of facts is now available in the Ohio courts of appeals.
21 U.S. Const. art. III, § 1 (seemingly recognizing Congressional discretion regarding even the establishment of intermediate appeals courts).
22 Recognition comes pursuant to the legislative power delegated in Ohio Const. art. IV, § 1 (“The judicial power of the state is vested in . . . courts of common pleas . . . and such other courts inferior to the supreme court as may from time to time be established by law.”).
peals upon questions of law may come to the Ohio courts of appeals, including the courts of common pleas, the municipal courts and the county courts. In contrast, the United States courts of appeals entertain appeals from only one general trial court, the district court.

Contemporary appellate authority of the Ohio courts of appeals is a matter of legislative judgment substantially uninhibited by federal constitutional restraints. In Blackledge v. Perry, the United States Supreme Court noted it had “never held that the states are constitutionally required to establish avenues of appellate review.” Further, to date there appear to be no significant state constitutional limits on such legislative judgment. Thus, the firmly entrenched concept of “one trial, one review” is implemented in Ohio via legislative policy determinations implicit in the Ohio Revised Code.

B. Case Volume

Since the elimination of the circuit courts, an Ohio constitutional provision has indicated that in each appellate district, “there shall be a court of appeals consisting of three judges.” Yet, since 1959, additional provisions have declared, “Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case.” Today, there are twelve appellate districts with fifty-two judicial offices. Five districts remain staffed with the required

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4In addition to reviewing cases from the district courts, the appellate courts also have such other jurisdictional authority as entertaining cases or orders coming from federal administrative agencies or officers, see, e.g., 28 U.S.C. § 2342 (1976).


6But see State v. Nickles, 159 Ohio St. 353, 112 N.E.2d 531 (1953), where the court stated: “A reading of Article IV of the Constitution of Ohio is convincing that it is the spirit of our fundamental law that a litigant shall be entitled not only to a fair and impartial trial but shall have at least one review if he so desires.” At that time Article IV provided for appellate court jurisdictional authority in the same way as does the present Ohio Constitution. Compare Ohio Const. art. IV, § 6 (amended Nov. 7, 1944) with Ohio Const. art. IV, § 3 (adopted May 7, 1968). And note that an earlier state constitutional provision, Ohio Const. art. IV, § 6 (amended Sept. 3, 1912), supra note 9, was read to limit legislative judgment. Haas v. Mutual Life Ins. Co., 95 Ohio St. 137, 115 N.E. 1020 (1916) (finding the General Assembly without power to limit appeals in chancery cases from the superior court of Cincinnati to the Court of Appeals).

7Id. Whiteside, supra note 18, at § 1.18.

8Ohio Const. art. IV, § 6 (1851, amended 1912); Ohio Const. art. IV, § 6 (1851, amended 1944); Ohio Const. art. IV, § 6 (1851, amended 1959); Ohio Const. art. IV, § 3.

9Id.

minimum of three judges. Of the remaining seven districts, four districts have four judges, two districts have six judges, and the largest district has nine judges. The number of judicial offices has only recently dramatically increased. During the 1970's when there were eleven appellate districts, the number of judicial offices was no greater than forty-four. Notwithstanding this significant growth in the number of appellate court judges, the increase has not kept pace with the rising numbers of cases brought before the courts of appeals.

In 1961, the Ohio General Assembly increased the number of appellate judges in a district for the first time by authorizing three additional judges for the eighth district and one additional judge for the tenth district; the new judges were to take office in 1963. At the close of 1961, there was a total of 1,038 cases pending before the courts of appeals, thereby averaging about thirty cases per judge authorized. In 1980, the Ohio General Assembly further increased the number of appellate judges to fifty-two, with authorization for fifty-three by 1983. Yet, at the close of 1980, there were at least 5,290 cases pending, thereby averaging at least 100 cases per judge authorized.

Statistics on a district level are often more staggering. In the sixth district, for example, the same eight counties have constituted the district since the late nineteenth century, and until 1981 there were only three judges comprising that court of appeals. At the close of 1961 there were seventy cases pending before the sixth district appellate court, while at the close of 1980 there were 379 pending cases. Thus, in the twenty-year period the number of pending cases rose over 500% while the number of judges rose only approximately 33%.

In the fourth district, the number of cases pending at the close of the year rose

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31 The third, fourth, seventh, eleventh and twelfth districts, OHIO CONST. art. IV, § 3 and OHIO REV. CODE ANN. § 2501.01 (Baldwin 1981), for which there are no legislatively authorized increases.
32 The second, fifth, sixth and ninth districts, OHIO REV. CODE ANN. 2501.013(A), 2501.011(A), 2501.011(B), and 2501.012(B) (Baldwin 1978). The fifth district is scheduled to gain a fifth judge in 1983, OHIO REV. CODE ANN. § 2502.011(A) (Baldwin 1978).
33 The relevant districts are the first and tenth, OHIO REV. CODE ANN. §§ 2501.013(A), 2501.012(C) (Baldwin 1981).
34 The eight district, composed only of Cuyahoga county. OHIO REV. CODE ANN. § 2501.012(A) (Baldwin 1981).
35 See 129 LAWS OF OHIO 11-12, § 1 (1961); 132 LAWS OF OHIO 941 & 2507 (1968); 136 LAWS OF OHIO 2616, § 1 (1976).
38 24 Ohio Courts No. 4, at 5 (1981) (the statewide total listed is 6,121, though the sum of the figures from the eleven districts is 5,290; the disparity between 5290 and 6121 may result from the failure to include cases from the twelfth district).
39 See 84 LAWS OF OHIO 240, § 1 (1887); OHIO REV. CODE ANN. § 2501.01 (Baldwin 1981).
40 See 132 LAWS OF OHIO 941 & 2507 (1968); OHIO REV. CODE ANN. § 2501.011(B) (Baldwin 1981).
41 5 Ohio Courts 1961 Summary, at 3 (1962).
from fifty-one in 1961\textsuperscript{44} to 454 in 1980.\textsuperscript{45} The fourth district remains staffed with three judges, as it has for at least the past sixty years.\textsuperscript{46} And in the first district, the number of judges has doubled from three to six from 1961-1980.\textsuperscript{47} Yet, notwithstanding a reduction in the counties within that district,\textsuperscript{48} the number of cases pending at the end of 1980 was 1,097\textsuperscript{49} while the number at the end of 1961 was only ninety-seven.\textsuperscript{50}

Assuming that today’s appellate cases are no easier than those of 1961 and that the number of cases filed in the appellate courts will continue to increase,\textsuperscript{51} seemingly one of two choices will have to be made by the General Assembly. It can either: 1) continue its pattern of raising the numbers of authorizations for judicial offices; or 2) eliminate legislative constraints on the types of cases subject to appellate jurisdiction, as well as on the manner in which any such jurisdiction should be exercised.

C. Meeting the Demands

The demands made by increased case filings, and the resulting backlog, should not be met simply by raising the numbers of judges. Rather, there is a need for significant changes in the business and operating manners of the Ohio courts of appeals. Fortunately, recent experiences in other intermediate appeals courts — both federal and state — provide many insights about the nature of such necessary changes.

As indicated, the general approach in Ohio to date has been to increase the numbers of judges as case volume grew, though there have been some experiments with other approaches initiated by local appeals courts. This general approach has failed as, particularly in the last twenty-five years, the additional volume of new cases has far outstripped the corresponding increase in new judgeships. But even if the number of new judgeships had kept pace with the growing case volume,\textsuperscript{52} continuing such an approach has severe shortcomings.

\textsuperscript{44}Ohio Courts 1961 Summary, at 3 (1962).
\textsuperscript{45}Ohio Courts No. 4, at 5 (1981).
\textsuperscript{46}See Ohio Const. art. IV, § 6 (1851, amended 1912); Ohio Rev. Code Ann. §§ 2501.01-.013 (Baldwin 1981).
\textsuperscript{47}Three additional judges for the first district took office in February, 1977. 136 Laws of Ohio 2616, § 1 (1976).
\textsuperscript{48}Compare 132 Laws of Ohio 940 & 2407 (1968) (noting the first district included Hamilton, Clermont, Butler, Warren and Clinton counties) with Ohio Rev. Code Ann. §§ 2501.01 (Baldwin 1981) (indicating the first district now includes only Hamilton County).
\textsuperscript{49}Ohio Courts No. 4, at 5 (1981).
\textsuperscript{50}Ohio Courts 1961 Summary, at 3 (1962).
\textsuperscript{51}These assumptions we are willing to make. Others have suggested today’s appellate cases are, in fact, becoming more difficult. Lawyers Conference Committee on Federal Courts and the Judiciary, 19 Judge’s J. 33,34 (1980) (“One component of the appellate workload problem is the increasing complexity of many of the new filings.’”).
\textsuperscript{52}To reduce the ratio of pending cases/authorized judges to the 1961 level, the number of judicial offices would have to be at least tripled, if not quadrupled. Supra note 39 (dividing either 5290 or 6121 by 30). Incidentally, Ohio is not alone in its failure to keep pace. In reviewing the growth in state intermediate appeals court judges nationally from 1966-1979, two commentators found that “[n]early all intermediate courts expanded — and expanded greatly. The number of intermediate court judgeships, including those
As Judge Friendly has noted, a court of appeals is a collegial body where collegiality seemingly diminishes rather than increases with dramatic additions of new judges.\textsuperscript{33} The judge observes:

Beyond all this is the desirability of judges of a collegial court really knowing each other, talking together, lunching together even—perhaps particularly—drinking together. This promotes understanding, prevents unnecessary disagreements, and avoids the introduction of personal animosity into those differences of opinion that properly occur. I believe that close personal relationships have been one of the sources of strength of the Supreme Court; when these have degenerated, so has the Court’s performance. I thus agree again with Professor Geoffrey Hazard that “it will therefore be simply impossible, in the foreseeable future, to solve the problem of too many appeals by increasing the number of judges.”\textsuperscript{54}

Assuming larger numbers of judges can still “drink together,” the chance of one three-judge panel proceeding in ignorance of what another three-judge panel is doing inevitably rises as judicial numbers are increased.\textsuperscript{55}

Of course, the number of judges in any one appellate district can always be limited simply by expanding the number of appellate districts. In Ohio, this method has kept certain courts of appeals from becoming too heavily laden with judicial officers.\textsuperscript{36} Yet, the method has not been employed in districts embodying only one heavily populated county.\textsuperscript{57} Apparently, the General Assembly refuses to divide a single county into two appellate districts. Even assuming expansion of judicial districts can promote collegiality by limiting any one district
to no more than a few judges, the method is still flawed. As the number of districts grow the chance for inter-district conflicts increases, resulting in the possibility of numerous denials of equal protection and of certifications to the Ohio Supreme Court based on the "interest" in such conflicts.58

Beside diminution in collegiality, knee-jerk increases in judgeships as case volume grows constitutes an expensive habit. As Judge Kaufman has observed:

We do need more judges. But legislatures, sensitive to public displeasure with rising taxes and higher judicial outlays, are going to balk at the millions required to build new courthouses, create more judgeships, and hire the supporting personnel if we attempt to solve all our problems by simply increasing the number of judges. It is like adding more engineers to a railroad still operating with steam instead of diesel engines.

There was a time when we could perhaps afford the luxury of having full time judges deal with every minute detail of a judicial proceeding; but that moment is gone. We are in a crisis. We have more litigation, the cases are more complex, and the load continues to grow.59

No expenses incurred by the state in providing an avenue for appellate review are reimbursed by any of the parties. While frivolous appeals may lead to the appellant's payment to the appellee of reasonable expenses including attorney fees and costs,60 they lead to no payment to the State. Similarly, while costs may be taxed against an appellant if an appeal is dismissed or a judgment is affirmed, and while costs may be taxed against the appellee if a judgment is reversed,61 no payments are ever made to the State.

Undoubtedly, an increase in the number of judicial officers would meet some of the contemporary demands on the courts of appeals posed by the existence of the "one trial, one review" concept in a litigious society. However, further medical treatment will be needed to avoid the unceremonious burial of the present appellate judges in a backlog of cases. The appropriate prescription includes changes both in the business and the operating manner of the intermediate appeals courts. The next few pages will examine some possible remedies.

III. REFORMS IN THE BUSINESS OF THE OHIO COURTS OF APPEALS

As noted, the Ohio courts of appeals possess appellate jurisdiction to review orders of inferior courts of record, including the common pleas and

58OHIO CONST. art. IV, § 2 (B) (2) (d).
59Kaufman, The Judicial Crisis, Court Delay and the Para-Judge, 54 JUDICATURE 145, 148 (1970). Judge Kaufman proceeds to suggest increased use of para-judges. See also Carrington, supra note 55, at 138-40. Of course, financial costs can be reduced if lawyers are recruited as judges. See Lawyers Recruited as Judges in Oklahoma, 68 A.B.A.J. 792 (1982).
60OHIO R. APP. P. 23.
61OHIO R. APP. P. 24.
municipal courts. Such jurisdictional power must be exercised upon the timely filing and diligent prosecution of an appeal from an appropriate lower court order. This jurisdictional power embodies the concept of "one trial, one review," a concept which is not unique to Ohio. Notwithstanding its longevity and its wide acceptance elsewhere, however, the concept may be in need of legislative reconsideration.

The need for re-evaluation of the "one trial, one review" concept was cited by at least a few judges who responded to our survey. One judge focused on criminal appeals, suggesting an "investigation into the desirability and feasibility of requiring the courts of appeals to grant a motion to certify prior to hearing "any appeal of a minor misdemeanor conviction, or other misdemeanor not involving a sentence including days of confinement." A second judge went beyond criminal cases suggesting "exploration of the limiting of cases which can be appealed," and noting "[P]erhaps, a financial limit in civil cases, a bar to manifest weight questions where a jury verdict has been rendered; a bar to criminal appeals where a sentence has not been imposed and/or where the fine and costs are below a certain limit." Similar re-evaluation and reform

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See supra notes 17 and 23.

Footnotes:

62 The power derives from Ohio Rev. Code Ann. § 2501.02 (Baldwin 1978), which employs the phrase "upon an appeal." That phrase is comparable to the Ohio constitutional phrase "in appeals," Ohio Const. art. IV, § 2(B)(2)(a), governing the Supreme Court's mandatory jurisdiction, and contrasts with the certification procedure, Ohio Const. art. IV, § 2(B)(2)(d), governing the Supreme Court's discretionary power to review (upon showing of public or great general interest).

63 In Ohio, the rules provide appeals in both civil and criminal cases usually must be filed "within thirty days of the date of the entry of the judgment or order appealed from." Ohio R. App. P. 4(A) & (B). After the expiration of this thirty day period, an appeal as of right in criminal cases "may be taken only by leave of court." Ohio R. App. P. 5(A). Incidentally, it has been suggested that statutory ambiguity mandates "the safe course to follow" in civil cases is to file notice of appeal within twenty days. Whiteside, supra note 18, at § 7.04.

64 Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." Ohio R. App. P. 3(A). See also Ohio R. App. P. 11(c) (appellants' failure to cause timely transmission of the record may lead to dismissal).

65 Often, it is difficult to distinguish appealable from nonappealable orders, notwithstanding the definition of the final order in Ohio Rev. Code Ann. § 2505.02 (Baldwin 1978). See, e.g., T. Koykka, Ohio Appellate Process, § 6.02 (Cum. Supp. 1981); Whiteside, supra note 18, at §§ 3.19 (distinguishing between trial court decisions and judgments) and 5.03 (distinguishing between preliminary or interlocutory orders and appealable order). For examples of final appealable orders, see Whiteside, supra note 18, at § 5.18.

66 See supra note 27 and accompanying text.

67 In United States ex rel. Johnson v. Cavell, 468 F.2d 304, 315 (3rd Cir. 1972), the court observed:

it should be noted that the Constitution does not require the states to afford appellate review of criminal convictions. There simply is no federal constitutional right to appeal. Thus, the mere averment that petitioner has been denied the right to appeal does not, without more, properly invoke the habeas jurisdiction of the federal courts.

Pennsylvania, as all other states, however, although not constitutionally required to do so, has elected to provide appellate review of criminal convictions as a matter of right (footnotes omitted). But see Stone v. Powell, 428 U.S. 465, 475 n.7 (1976) ("Prior to 1889 there was, in practical effect, no appellate review in federal criminal cases").
presently are being both discussed and implemented outside of Ohio.\textsuperscript{71}

Maybe the easiest place to start excepting to the “one trial, one review” concept is in situations where the one trial has been preceded by an earlier trial. Presently in Ohio, the mayors in most municipal corporations wherein there exist no municipal courts have jurisdiction to hear and determine any prosecution for the violation of an ordinance of their municipality,\textsuperscript{72} together with jurisdiction in most criminal causes involving moving traffic violations occurring on state highways located within the boundaries of the municipality.\textsuperscript{73} Appeals from a mayor’s court may be taken to a relevant municipal or county court\textsuperscript{74} where proceedings are de novo.\textsuperscript{75} When such municipal or county court proceedings are appealed to a court of appeals, there exists a “one trial, two appeals” concept.\textsuperscript{76} It seems reasonable to consider eliminating the courts of appeals duty to hear such cases, perhaps by making this appellate court review unavailable,\textsuperscript{77} or discretionary with the courts,\textsuperscript{78} or unavailable unless the sole issues raised relate to the constitutionality of the statute or ordinance on which the conviction is based.\textsuperscript{79}


\textsuperscript{72}Ohio Rev. Code Ann. § 1905.01 (Baldwin 1979). Exempted municipal corporations are those where “a judge of the Auglaize county, Crawford county, Jackson county, Miami county, Portage county or Wayne county municipal court sits” as required by law. Id.

\textsuperscript{73}Id. Exempted criminal cases are those governed by Ohio Rev. Code Ann. §§ 2937.08 & 2938.04 (Baldwin 1979). Incidentally, much of the mayor’s court jurisdiction is concurrent with the jurisdiction of others. Ohio Rev. Code Ann. § 1907.031 (Baldwin 1977) (concurrent jurisdiction in the county court).

\textsuperscript{74}Ohio Rev. Code Ann. § 1905.22 (Baldwin 1977).

\textsuperscript{75}Ohio Rev. Code Ann. § 1905.25 (Baldwin 1977).

\textsuperscript{76}Or a “two trial, one appeal concept” if an appeal de novo is deemed a trial. Id. And consider the comments of Judge Friendly on appellate court review of trial court determinations of appeals from administrative agency action:

A somewhat more debatable change, still within the contours of the existing system, would be to provide that where review of administrative action lies in the district court and that court has affirmed, appeal should be only by leave of the court of appeals. The argument would be that it is enough to grant an aggrieved citizen one judicial look at the action of disinterested governmental agency, unless a superior judicial body believes the case to present a problem going beyond the particular instance. There would be much to recommend such a procedure, for example, with respect to the many complaints of denial of relief, whether partial or total, by the Social Security Administration (footnotes omitted).


\textsuperscript{77}It has been suggested that such unavailability of any review is to be avoided because of the “penal element” in the lower court proceedings, as well as the “prosecutorial initiative conferred on the state.” Standards Relating to Appellate Courts § 3.80 commentary at 110 (1977) [hereinafter cited as Standards].


\textsuperscript{79}Such an approach recently has been employed in Texas. Tex. Code Crim. Pro. Ann. art. 4.03 (Vernon 1982 Pocket Part).
It is perhaps a bit less reasonable to consider an exception to the “one trial, one review” concept in the criminal setting beyond those cases begun in a mayor's court. Any such exception may well be unique among the American states. Yet, why not become the exception, at least in criminal cases where no confinement is ordered, where any assessed fines and costs involve insubstantial dollar amounts, and where a conviction neither has a foreseeably significant role in any future state proceeding (judicial or administrative) nor stigmatizes the violator in the eyes of his or her community? The creation of such an exception seems particularly appropriate if one of the surveyed judges is correct in observing that these criminal cases occur fairly frequently and rarely present any legitimate issues of law. Such an exception would bring several benefits, including financial savings to both the state, which must support the courts of appeals, and to the appellee. It would also allow the appellate court judges to spend more time on those cases where more is at stake. Further, such an exception arguably does contain the rationale needed for the inequality in treatment between groups seeking to appeal criminal convictions.

Regarding civil cases, the American Bar Association’s Commission on Standards of Judicial Administration has suggested that appellate review of on-record civil proceedings involving limited amounts (at least those under $2,500, and perhaps those up to $10,000) should be permitted only in the discretion of the appellate court. This suggestion was prompted by a desire to “keep expense to the parties and burden on the courts at a level reasonably proportionate to the matters in controversy.” For similar reasons, it has recently been suggested that federal courts of appeals should be granted discretion “to refuse to review, at least in civil cases, any appeal that on its face does not appear to be substantial or meritorious.”

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"Supra note 68. See also Note, supra note 71, at 220-21 (arguments against exceptions to the “one trial, one review” concept).
"Response of Judge 25.
"While figures on the cost to the state of providing a mechanism for the hearing of an appeal in a single case seem incalculable to us, one intermediate appeals court judge estimated the cost, at least in the State of Washington, to be between $1000 and $2000. Callow, supra note 78, at 36. For a cost-benefit analysis of another long-established judicial procedure, the jury trial, see Alexander, Civil Juries in Maine: Are the Benefits Worth the Costs?, 34 ME. L. REV. 63, 65-66 (1982).
"See supra notes 60 and 61 and accompanying text.
"On the need for a rationale, consider Justice Harlan’s concurring opinion in Griffin v. Illinois, 351 U.S. 12, 37 (1956):

Of course, the fact that appeals are not constitutionally required does not mean that a State is free of constitutional restraints in establishing the terms upon which appeals will be allowed. It does mean, however, that there is no ‘right’ to an appeal in the same sense that there is a right to a trial. Rather, the constitutional right under the Due Process Clause is simply the right not to be denied an appeal for arbitrary or capricious reasons.

"STANDARDS, supra note 77, at § 3.80(a).
"Id. at § 3.80 commentary at 110.
"Lay, supra note 71, at 1155.
Because it is uncertain how insubstantial or unmeritorious appeals can be quickly and correctly distinguished from those worthy of review,\textsuperscript{8} consideration should be given to discretionary review of civil cases valued below a certain dollar amount. A $10,000 figure appears a bit too high, at least presently, and exceptions might need to be made for certain civil cases. For example, cases involving low dollar amounts, but also significant federal or state constitutional questions, might need to be exempted so that they are not repeatedly resolved without appellate court review.

Regardless of whether or not exceptions are made to the "one trial, one review" concept, there is a need to re-evaluate the manner in which the Ohio courts of appeals' business is conducted. Restricting the business of these appellate courts will not, by itself, provide a long-term solution to the problem of ever-increasing caseloads. And, the re-evaluation of the manner of conducting business can provide many benefits. Consider the recent observations of Judge Godbold, a federal appeals court judge for the past sixteen years:

If the enormous growth of appellate caseloads is an ill wind, it has blown considerable good. It has forced appellate courts to re-evaluate what they are doing and to think about whether and how they can do it better.

Courts are not always attuned to re-evaluation. Lawyers and judges, schooled in history and precedent, are wedded to the past. We tend to do things in familiar and uncomfortable ways that bear the seal of previous approval. But the external force of caseloads has pushed appellate courts out of their accustomed channels of thought. Events beyond the control of the courts has engendered a spirit of reexamination . . . .

No more significant re-evaluation has occurred than scrutiny of the premise that all appellate cases . . . must be immutably accorded the full range of all appellate procedures. Courts have found the courage to look with questioning eyes at their policies on oral argument, the necessity for opinions, the content of opinions, and the contents of records.\textsuperscript{9}

\textsuperscript{8}One judge has suggested the following procedure:

each litigant seeking an appeal in any civil proceeding would be required to file a petition for discretionary review with the notice of appeal. The petitions would be limited to ten pages and would set forth the reasons the appeal should be allowed. Each petition would attach a copy of the district court's memorandum and judgment. Third, a three-judge panel would then review this petition within ten days of its filing. Any one circuit judge could grant the petition by directing the clerk's office to docket the appeal . . . . If the panel desires, it may request a response to the petition from the other side. Fourth, if the face of the petition presents any colorable issue of disputed law or presents a serious challenge to the sufficiency of the evidence, the appeal should be allowed. Fifth, a district court could certify that an appeal presents a colorable issue for review; if such a certification is given, the parties could proceed without further permission from the court of appeals. Sixth, if the petition for review is not deemed insubstantial by the panel, but nonetheless appears to raise a narrow or simple issue for review, the court may allow docketing of the appeal, set the matter down for summary argument without plenary briefing, and summarily dispose of the case by opinion or order. This latter procedure could aid the courts in establishing a summary calendar and serve to expedite and process a large number of appeals.

There are encouraging signs in Ohio that the spirit of re-examination has begun.90 The next section will discuss possible changes in the operating manner of the Ohio courts of appeals in hopes of further promoting judicial and legislative re-evaluation.

IV. REFORMS IN THE OPERATING MANNER OF THE OHIO COURTS OF APPEALS

Assuming that all appellate cases in the Ohio courts of appeals can no longer be immutably accorded the full range of all appellate procedures, choices must be made regarding which cases should receive less than the full range of traditional procedures and which procedures are most expendable. A variety of cases and procedures are suggested by recent commentaries, as well as by changes in other jurisdictions. Possible reforms can be characterized in a number of ways.91 This article will examine such reforms within the context of the prehearing, hearing, and posthearing stages in the intermediate appellate court process.92 This examination is not meant to present an exhaustive list of possible reforms, nor a comprehensive analysis of the potential changes which are discussed. Rather, it is intended to promote further discussion, and perhaps action, on some of the more viable means of coping with the pressures on Ohio’s intermediate appellate courts.

A. Prehearing

Several prehearing devices have been suggested, if not used, for easing the pressures of case backlogs. All but one appears either quite unappealing or unworthy of extended discussion. For example, in the state of Washington there is pending a proposal to quadruple the appellate filing fees in order to discourage non-meritorious appeals, particularly frivolous civil appeals.93 This is quite unattractive. It is equally unappealing to suggest that appellate cases could be reduced with the establishment of a very short time period for the filing of an appeal from a lower court judgment. Finally, difficulties elsewhere regarding rules requiring appellants to file a separate appendix94 do not merit discussion, as the Ohio courts of appeals do not discourage appeals by the imposition of this costly

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91 For example, reforms might be differentiated according to the decisionmaker (legislature, supreme court, local courts of appeals, courts of appeals judges) responsible for initiating reforms. As well, reforms might be distinguished based upon the varying lower courts whose decisions are reviewed (limited jurisdiction/general jurisdiction, or law-trained/lay judges); upon whether review is mandatory or discretionary; upon the nature of the case reviewed (civil/criminal, or a little money/a lot of money, or felony/misdemeanor); or upon the issues raised on appeal (constitutional, statutory, common law, etc.).

92 In doing so, we define hearing to include those steps in the appellate process relating to the litigants' opportunity to be heard, as contrasted with the prerequisite steps to a hearing (i.e., timely appeal, filing fees) and with the courts' decisionmaking responsibilities after the hearing (i.e., written opinions, publication of opinions).

93 Callow, *supra* note 78, at 36.

prerequisite to a hearing.95

One appealing and worthy prehearing device, which has been used both in96 and out97 of Ohio to help ease the pressure of case backlogs, is the prehearing conference. Pursuant to rule, an Ohio court of appeals "may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court."98 Orders entered following a prehearing conference typically control the subsequent course of the appellate proceeding.99

For the prehearing conference device to be viable, the appellants, or all parties, would have to file prehearing conference statements.100 These statements would constitute neither appellate briefs nor trial transcripts.101 Rather, they would provide the court with minimal, but adequate, information upon which discussions at the conference could be based. The statements' contents might need to vary depending upon the purpose or purposes of the conference, but should include at least: (1) the trial and appellate courts' numbers; (2) the names, phone numbers, and addresses of the parties and counsel; (3) the type of litiga-

96Responses to the survey indicated that at least the appeals courts in the first, sixth and eighth Districts have used prehearing conferences in appellate cases in seeking to reduce case backlogs. But such uses apparently have been discontinued. See Responses of Judges 20, 23 and 25. Local appellate rules typically do not address the prehearing conference option. But see OHIO 1ST DIST. R. (indicating the multiple purposes of conferences in civil appeals, which can only be had subsequent to the filing of Form II, Civil Docket Statement), and 8TH DIST. R. 14 (no conference in absence of any attorney of record, except by waiver). For a review of the experience in the Sixth District Court of Appeals, see Potter, Prehearing Conferences. A Report on a New Approach, 26 TOLEDO BAR ASSOC. NEWSLETTER 8 (April, 1979). For a review of the experience in the First Appellate District, see Letter from Judge George Palmer to Professor Jeffrey Parness (April 28, 1982) (copy on file with AKRON LAW REVIEW).
97Prehearing conferences are utilized in most federal circuit courts, though their purpose and form vary. See D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME, Appendix F at 231-239 (1974) (Informative, but some of the information is now outdated). See also, 8th CIR. R. 2 (mandating conferences in certain civil appeals), and 13 THIRD BRANCH 3, col. 1 (June 1981). For recent descriptions of state court use of such conferences in civil case appeals (to either an intermediate or a high court) see, e.g., Crouch, The New Maryland Appellate Pre-Argument Conference, 14 MD. B.J. 7 (April 1981); Janes, Paras, and Shapiro, The Appellate Settlement Conference Program in Sacramento, 56 CAL. ST. B.J. 110 (1981); Scott and Moskal, The Prehearing Conference — Perhaps Your Only Opportunity to Present Oral Argument to the Minnesota Supreme Court, 7 WM. MITCHELL L. REV. 283 (1981); Note, The Minnesota Supreme Court Prehearing Conference — An Empirical Evaluation, 63 MINN. L. REV. 1221 (1979) (the Minnesota high court is the state's only real appellate court).
98OHIO R. APP. P. 20
99Id. The appellate court's discretion in calling a conference, together with the controlling effect of any resulting order, make Rule 20 similar to Rule 16 of the Ohio Civil Rules on pretrial conferences.
100In the First Appellate District of Ohio, the Civil Docket Statement is only completed by the appellant. OHIO 1ST DIST. R. 10, supra note 96. By contrast, in Minnesota a similar statement is filed by both sides, MINN. R. CIV. APP. P. 133.02(A), though that rule was only recently changed, see Note, supra note 97, at 1224 n.18. In Maryland the filing by the appellee is discretionary with the party, Md. R. P. 1023(B). See also the Appeal Information Form, 8th CIR. R. 1 (both parties). The few extra days it would take appellee to file a supplemental statement is well worth the slight, additional time delay (in Minnesota, the appellee has ten days to supplement, id.).
101In describing such statements, a court would be wise to indicate the differentiation from a brief or transcript in BOLD TYPE. Note, supra note 97, at 1227 n.22.
tion involved; (4) the nature of the judgment or order appealed from, together with a copy of the same and any supporting trial court memorandum; (5) the probable issues to be raised on appeal, together with copies of any trial briefs thereon; and, (6) the type of record probably relevant to the appeal. In large part such statements could be supplied on forms provided by the clerk’s office.

Prehearing conferences have been employed for any one of several reasons, and for a multiplicity of purposes. The major motivations in scheduling a conference have been to help the court to: (1) expedite or facilitate the hearing and resolution of the appeal in a traditional manner, including briefing, oral argument, and written decision; (2) settle the appeal without judicial decision; or, (3) dispose of the appeal by judicial decision without according the traditional hearing and resolution. In Ohio, the general rule is broad enough to cover any or all of the foregoing motivations.

The utilization of a formal prehearing conference device solely to expedite or facilitate a traditional appellate proceeding is seldom found. However, in the District of Columbia Court of Appeals a civil appeals management plan was initiated to simplify and expedite appeals. There, conferences typically were conducted by the Chief Staff Council, and contacts often were only by letter or telephone. The aim was to gain agreement on the scheduling of briefs and arguments, to decrease the number of briefs filed in complex cases, to arrange for the filing of briefs longer than the rules ordinarily permit, and to arrange for the allocation and length of oral argument time—all “without bothering the court with a number of motions.” Formal conferences with counsel present and with judicial involvement seem unwarranted to achieve such goals. Non-judicial court personnel can be delegated the authority to assist in the drive to expedite and facilitate the hearing of appeals. And recent evidence seemingly indicates that, notwithstanding the lack of any mandatory prehearing conference, appellate adversaries do communicate with one another in attempts to ease the burdens of appellate litigation.

Assuming the legitimacy of holding prehearing conferences for the pur-

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102 OHIO 1ST DIST. R. 10, supra note 96. Note, supra note 97, at 1227 n.22.
103 STERN, supra note 71, at 479. See also Civil Appeals Management Plan of the D.C. Circuit (copy on file with Akron Law Review).
104 STERN, supra note 71, at 479.
105 Id. at 479-80.
106 Id. at 480.
107 In the District of Columbia, the local appeals court can be resorted to by motion if the Chief Staff Counsel’s action is deemed inappropriate. Id. In Ohio’s First Appellate District the court administrator or a staff attorney sometimes handle pre-appeal conferences in civil cases, with counsel but not judges present. See Letter from Judge Palmer, supra note 96.
pose of inducing settlements, there is sharp debate on the benefits derived. The American Bar Association’s Task Force on Appellate Procedure recently observed:

On the pro side, if the system does accelerate dispositions without briefing, argument, or opinions, then it has achieved a distinct benefit. On the other hand, if all that happens is that an extra time-consuming step is injected into the process, or if undue pressure to settle is being forced on the parties, or if the only cases being settled are those which would be settled anyway, then the achievement is, at best minimal.

Though several empirical studies have been made recently of appellate court rules designed to promote settlement, the results are mixed. The responses received from Ohio appeals court judges are also mixed.

It seems inappropriate for the Ohio appellate courts to move forward now with a major program embodying numerous prehearing conferences designed to induce settlements in all or most civil appeals. The experience with such conferences in other states indicates that judicial officers would need to preside in order for the program to have any chance of significant success. Judicial officers simply are not available in most appellate districts in Ohio, even assuming retired judges are willing and usable. According to one Ohio appeals court

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109One distinguished commentator on appellate procedure has deemed such conferences of “doubtful” legitimacy even if they do result in a reduction of the judicial work load. Stern, supra note 71, at 479.

110Stern finds “the benefit of a prehearing conference does not seem to be worth any substantial effort,” id. at 479, though he recognizes the U.S. Court of Appeals for the Second Circuit is “satisfied” with its plan for prehearing settlement conferences and will continue with it.


112Goldman studied the U.S. Court of Appeals for the Second Circuit, and found its plan did improve the court’s “overall performance,” but that “the magnitude of improvement was slight.” Goldman, supra note 108, at 1237. A study of the Minnesota Supreme Court’s experiment was less reluctant to proclaim a “success.” Note, supra note 97, at 1256. These two studies were based on similar evidence, e.g., surveys of participating overseers and attorneys, as well as comparison of cases which did and did not undergo a prehearing conference. The Second Circuit program relied upon staff counsel to conduct the prehearing conference, while the Minnesota Supreme court’s experiment — at the time studied — utilized both judicial and nonjudicial officers. See Goldman, supra note 108, at 1217-18; Note, supra note 97, at 1228. The Minnesota program now utilizes only judges, Minn. R. Civ. App. P. 133.02(D), and there is much debate about the additional effectiveness of using judges rather than staff counsel or other nonjudicial officers. See Note, supra note 97, at 1231-2; Goldman, supra note 108, at 1238 (“This experiment suggests that judge participation may be needed to achieve the desired reduction in the overall judicial burden”). See also Weisberger, supra note 78 at 250-52.

113One judge noted prehearing conferences “could be used to greater advantage,” while another felt they “should be used as extensively as possible.” Responses of Judges 9 and 21. Yet, there was a judge who questioned the cost effectiveness of such conferences, and another who found them of “little practical advantage.” Responses of Judges 7 and 18.

114Supra note 112.

115The availability of retired judges is subject to fluctuation, as there is no legal mandate for certain numbers to exist at any one time. This fluctuation would hamper any attempt at establishing a long-term program greatly dependent upon retired judges. In five of the twelve appellate districts today, there sit only three judges, see supra note 31 and accompanying text, the number needed to “participate in the hearing and disposition of each case,” Ohio Const. art. IV, § 3(A). In four other districts, there sit only four judges, supra note 32. Thus, regular judges are unavailable in most districts since we believe no presiding officer at the prehearing conference should ever participate in any subsequent hearing and disposition.
judge, an appellate district in Ohio, which had conducted a successful prehearing conference program, has abandoned the program due to "manpower restrictions."\[116\]

What does seem appropriate for Ohio is a program, perhaps experimental in nature and limited to fewer than all appellate districts, in which prehearing conferences are held in two types of appeals: (1) where there is a good chance that settlement could be reached in a civil appeal with the help of a neutral arbiter; and (2) where there is a significant (if not good or likely) chance that the appeal could be fairly decided without the full range of traditional appellate procedures. Such a program could be initiated pursuant to local rule,\[117\] and might not involve the need for additional fiscal expenditures.\[118\] Prehearing conference statements would form a basis for discussion at the conference.\[119\] However, such conferences should not be presided over by anyone potentially involved in the subsequent hearing and disposition of the case.\[120\] Possible presiding officers include appellate court judges, retired judges, or non-judicial appellate court staff members.

Experience indicates chances of settlement are greatest in civil appeals involving insubstantial money damages. The experience in California, for example, indicates "the largest number of settlements have been reached in personal injury and domestic relations cases" and that "money judgments and eminent domain actions are also generally good candidates for settlement conferences."\[121\] After reviewing both state and federal experiences, Professor Leflar noted "cases involving money damages have the highest probability of being settled," and that "more than one-third of the preheard cases are settled or withdrawn."\[122\] Certainly, the estimated expense of a traditional civil appeal will cause many litigants to think anew about settlement, particularly when a result of the prehearing conference includes an estimate by the informed presiding officer about the likely outcome should the appeal be fully heard.\[123\] Additionally, settlement

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\[114\] See Response of Judge 20.

\[115\] Ohio Const. art. IV, § 5(B) (courts can adopt additional rules concerning local practice not inconsistent with rules promulgated by the supreme court).

\[116\] Where available, retired judges as well as active judges might be employed. But see supra note 115. And, if nonjudicial officers are used, they may well be already existing court personnel (court administrator, law clerk(?), staff attorney).

\[117\] See supra notes 100-102 and accompanying text.

\[118\] This conforms to the rule utilized in most jurisdictions having substantial numbers of prehearing conferences. See, e.g., 8th Cir. R. 2(c) (confidentiality of "settlement-related material and settlement negotiating"); Crouch, supra note 97, at 9; Janes, supra note 97, at 110 (settlement conference proceedings are "confidential"). But note the recent change in Minnesota, which now permits a justice to participate in the final disposition of cases for which he has conducted a prehearing conference, and the bar's disapproval of the change. Note, supra note 97, at 1228 n.28 and 1254-55. In the Second Circuit, the staff counsel conducting the conference does not convey significant information to the court regarding the conference proceedings. Goldman, supra note 108, at 1217-18; Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928 (2d Cir. 1979) cert. denied, 444 U.S. 1076 (1980).

\[119\] Janes, supra note 97, at 111.


\[121\] Note, supra note 97, at 1229 (indicating presiding officials in Minnesota made educated estimates on
chances would appear significant in cases where litigants in prehearing conference statements indicated a willingness to negotiate with a view toward possible settlement.

Assuming attorneys at the appellate level usually discuss the possibility of settlement in cases where money damages or party willingness to negotiate are involved, one may wonder whether prehearing conferences would cause significant additions to the numbers of cases settled. Possibly they would, because:

First, ... the conference removes the problem of the party who is predisposed toward settlement but fears that any unilateral suggestion on his part would be seen by his opponent as an admission of weakness. Second, the conference makes it simpler for the lawyer who believes his client's case is weak to advise settlement, because a neutral and authoritative figure like the conference official would have given that same advice. Third, a recalcitrant party may become more amenable to settlement following a frank discussion ... which alerts him to the weakness or futility of his case on appeal. Fourth, settlement prospects are enhanced among parties who perceive the prehearing conference as their 'day in court' (cites omitted).

Of the concerns expressed regarding such settlement conferences, the most troubling is the prospect that in some cases the conference might simply provide a vehicle for harassment, or "a relatively inexpensive forum for attacking adverse lower court judgements" which would otherwise not be appealed and which are pursued with the hope of procuring a late settlement. While certain acts of bad faith might be detected and cured by the officer presiding at the prehearing conference, some faith in counsel's professional conduct seems necessary.

If the goal of settlement cannot be reached, attendants at a prehearing settlement conference should proceed to seek ways to promote a speedy, but just, judicial resolution. Counsel can agree to limit the number or length of any briefs; to provide the appellate court with an agreed "statement of the case" in lieu of a more elaborate record; to limit the length, or waive, the oral argument; and to limit the issues subject to appellate review. Also, pursuant to a limited delegated authority, the presiding officer could arrange for certain

the likelihood of reversal). The possible staff counsel action in prehearing conferences in the U.S. Court of Appeals for the Second Circuit has been described as follows:

In sum, if the appeal was viewed by staff counsel as without merit, or of so little merit as not to warrant the time of judges to decide the appeal, staff counsel would urge the appellant, with rhetoric and logic, to withdraw or encourage the parties to accept a compromise solution.

Goldman, supra note 108, at 1218.

Goldman, supra note 108, at 1235-56.

Note, supra note 97, at 1230.

Id. at 1232 and 1233 n.63.

Id. at 1233 n.63. On the means of discovering bad faith appeals, see Oberman, supra note 88.

Ohio R. App. P. 9(D).
modifications to the traditional appellate procedure which could otherwise be obtained only upon formal written motion and court order. For example, the presiding officer could grant extensions of the time allowed for filing, briefing, and argument if they were deemed warranted, or allow the filing of exhibits and over-sized briefs. The presiding officer could also permit oral arguments for particular parties to exceed thirty minutes, and hold the operating scheduling orders for certain appeals in abeyance, in hopes of promoting settlements.

Though it is a far more controversial purpose, further experiments should be conducted in Ohio involving prehearing conferences designed to promote occasional judicial resolution of appeals without certain well-established appellate procedures, even where there is no good chance that settlement can be reached. The use of prehearing conferences solely or primarily to expedite appellate court resolution is controversial because it involves court personnel — perhaps nonjudicial as well as judicial officers — in the decisional process, thought the ultimate responsibility for decision is with others. Yet, the scheduling of a prehearing conference for a multiplicity of possible goals, including settlement and a more expeditious judicial resolution, is not unheard of in American intermediate appeals courts. Furthermore, some such courts have also employed the prehearing conference for the primary purpose of achieving expeditious judicial resolution.

The issues confronting a court of appeals in initiating a prehearing conference program have been summarized as follows:

1. the point in the process where the screening mechanisms become operation; 
2. the person or persons who make the classification; 
3. the degree of involvement by staff personnel in making recommendations as to classifications; 
4. the degree to which oral argument is limited; 
5. the decisional process used in those cases which are not argued; and 
6. the degree of support by staff personnel in the decisional process in those cases

Goldman, supra note 108, at 1218.

Id.

Pursuant to OHIO R. APP. P. 21, "Unless otherwise ordered, each side will be allowed thirty minutes for argument."

Goldman, supra note 108, at 1218.

Pursuant to its recently adopted rules, the U.S. Court of Appeals for the Sixth Circuit allows a "preargument conference" for consideration of "the possibility of settlement, the simplification of the issues, and any other matters which . . . aid in the handling of the disposition of the proceedings." 6th Cir. R. 18 (C)(2). See OHIO 1ST DIST. 10, supra note 96, wherein Ohio's First Appellate District allows prehearing conferences to include discussions of:

1. The finality of the Order being appealed; 
2. type of record to be filed; 
3. probable time required to complete preparation of the record on the appeal; 
4. assignment of error and issues to be raised; 
5. any prior Court decisions on similar issues; 
6. time needed for briefing; 
7. the identity and address of all counsel involved; 
8. other matters relating to the case.

See also Md. R. P. 1024(B); 8th Cir. R. 2(a); Scott and Moskal, supra note 97, at 299.

See Meador, supra note 97, Appendix F at 231-39; Ubell, Report on Central Staff Attorneys' Offices in the U.S. Court of Appeals, 87 F.R.D. 253 (1980).
which are not argued.\textsuperscript{135}

Because experimentation within the districts is the initial step in establishing a pretrial conference program in the Ohio courts of appeals, the foregoing issues cannot be fully explored at this time. However, several observations are appropriate regarding any future experiments.

Experiments should be conducted with screening mechanisms which operate shortly after an appeal is filed. Such mechanisms would necessarily rely on so-called prehearing conference statements which provide basic information about the appeal, but which are far less substantial than the totality of written briefs, oral argument and the record. These statements should be required in cases in which there is a good chance either for settlement or for judicial resolution without the full range of traditional appellate procedures. Cases of this type should be described by a local rule which is capable of easy application by the court clerk as cases are filed. Such a local rule might distinguish civil and criminal appeals, and then further subdivide each category. For example, civil appeals might be characterized by the parties as involving less than a certain dollar amount; equitable, legal, or both equitable and legal relief; constitutional issues; nonconstitutional issues involving a controlling question of law as to which there is substantial ground for difference of opinion; discretionary determinations by the trial court; two courts' rather than one court's earlier involvement; judgments which foreseeably might be settled with court assistance; non-dispositive lower court orders; and noncompliance with relevant time limits for the filing of the appeal.\textsuperscript{136} Finally, there should be a variety of forms for prehearing conference statements, because information relevant to one character of civil appeal (where settlement is deemed possible, or where time limits have not been met) may not be needed for another.\textsuperscript{137}

Prehearing conferences of an experimental nature could be presided over by regular appellate judges, retired judges, court staff members or others.\textsuperscript{138}

\textsuperscript{135}Meador, supra note 97, at 232.

\textsuperscript{136}In making such characterizations, the local rulemakers should consider not only their court's prior experience, if any, but also the experiences in other jurisdictions regarding the types of cases most likely to settle, or to be resolvable fairly and yet without traditional appellate procedures. See, e.g., Leflar, supra note 122, at 31 (finding that money judgment cases are good candidates for settlement and that experience shows more than one-third of preheard cases are settled or withdrawn); Crouch, supra note 97, at 8 (pre-hearing conferences not valuable in most pro se appeals and where there exist constitutional issues or unique questions of law); Janes, supra note 97, at 111-12 (good candidates for settlement are personal injury and domestic relations, money judgment and eminent domain cases; undesirable candidates are cases raising constitutional issues, declaratory relief, or questions of law in areas where the Rule of law is unclear); Note, supra note 97, at 1243-44 (study confirming significant change of appellate case settlement where less than $10,000 is involved). Of course, designation of forms of civil cases for prehearing conferences cannot be based on such illegitimate factors as the litigant's indigency. Anders v. California, 386 U.S. 738 (1967).

\textsuperscript{137}In many appeals courts where such statements are sometimes required, there exist more than one form. See, e.g., Ohio 1st Dist. 10, supra note 96 (forms for both a criminal and a civil docket statement); 6th Cir. R. 18(B) and 20 (distinguishing between civil case pre-argument statements and one-page fact sheets in all Social Security appeals, Title VII appeals, habeas corpus § 2254 appeals and motion to vacate § 2255 appeals).

\textsuperscript{138}While regular appellate judges, Note, supra note 97, at 1228, retired judges, Benjamen and Norris, The
As noted earlier, whoever presides should not be involved in any subsequent hearing involving full briefing, oral argument and a record.\textsuperscript{139} Besides assisting in promoting settlement or a more expeditious route to judicial resolution pursuant to counsels' agreement,\textsuperscript{140} the presiding officer should be allowed to make recommendations to the panel assigned to the case. These recommendations would be based on findings regarding the merits (procedural or substantive) of an appeal upon which the parties seek a hearing. They might include advice on the need for full appellate procedures; on the need for emphasis on certain issues; on the lack of any need for oral argument; on the lack of any need for a published opinion, or any opinion at all; on the desirability of remand prior to an appellate hearing; and on the appropriateness of an award of costs, or sanctions. While many such recommendations would require the panel's early consideration (i.e., prior to the filing of briefs or any oral argument), we believe benefits can accrue to the court and to many appellate litigants with such early involvement. If recommendations are accepted by the court, nontraditional hearing procedures could be ordered which would result in time and money savings with no substantial injustice to appellate litigants with meritorious claims.

While experiments with forms of prehearing conferences seem a legitimate pursuit, in part because of potential financial savings, it appears that many, if not all, appeals courts are currently without the rather modest resources necessary to implement such experiments. Responses to the authors' survey indicated this, and even suggested that certain prior experimentation had been halted primarily for budgetary reasons.\textsuperscript{141} The survey also indicated the skepticism of some judges regarding the utility of such conferences.\textsuperscript{142} Where prehearing conference programs have been established elsewhere, early additional financial support has been necessary, and those providing the support have assum-

\textit{Appellate Settlement Conference, 62 A.B.A.J. 1433, 1436, and Janes, supra note 97, at 133, and staff members, Goldman, supra note 108, at 1217, have been used for varying prehearing conference, it may be that members of the local bar might also be used — as is done by the trial courts having compulsory arbitration rules. See, e.g., Rules of the Court of Common Pleas of Cuyahoga County, General Division and Domestic Relations Division, R. 29. Also consider whether use of staff members who would soon become "career clerks" is advisable. Oakley and Thompson, Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges, 67 CALIF. L. REV. 1286, 1293-95 (1979). See also CARRINGTON, supra note 54, at 44-46.}

\textsuperscript{139}Supra note 120.

\textsuperscript{140}See supra notes 128-32 and accompanying text.

\textsuperscript{141}See Responses from Judge 20 (citing "manpower restrictions" as reason for discontinuance); Judge 8 (citing pressures on "an already overworked sitting bench"); Judge 12 (no judges are "available"); Judge 14 (impractical to use "staff attorney"); Judge 19 (judges "do not have time," and there are inadequate legal and administrative staffs); Judge 13 (demands on judges' time are now too great for any utilization of prehearing conference rule).

\textsuperscript{142}Responses from Judge 7 (prehearing settlement conferences not "cost effective"); Judge 25 (results do not justify expenditure of judicial time); Judge 23 (likelihood of settlement remote); Judge 18 ("utilization of judicial man hours with limited benefits"); Judge 17 (little likelihood of settlement, but helpful in complicated cases); Judge 4 ("absolutely worthless"). More positive about the likely success of a prehearing conference program were the responses from Judges 6, 8, 9, 12, 13, 16, 19, 20, 21 and 24. The disagreements among sitting appellate judges about the utility of prehearing conferences was a strong motivating force in our suggestion of further experimentation in Ohio.
ed the necessary task of objectively evaluating the program.\(^4\) In Ohio, evaluation, if not financial support, might come from the supreme court’s exercise of its power of superintendence over all courts in the state.\(^4\)

**B. Hearing**

Review herein of possible reforms during the hearing stage of an intermediate appeals court proceeding need not be extensive in view of recent commentary in and beyond this symposium.\(^4\) Of course, any review of the hearing stage must take account of, and will be dependent upon, such factors as the nature of the appeals courts’ jurisdiction and of any significant prehearing proceedings. As noted earlier, certain changes in the jurisdiction and prehearing proceedings of the Ohio appeals courts are in order. This section will comment briefly on possible reforms during the hearing stage of a case which is within the appeals court’s jurisdictional authority and which has been determined worthy of full briefing.

The general appellate rules are quite explicit regarding the content of briefs, demanding that each contain varying tables; a statement of the assignments of error; a statement of the case, including statements concerning the issues and their relevant facts as well as the disposition in the court below; an argument, including reasons relevant to the assignments of error presented; and a short conclusion stating the precise relief sought.\(^4\) These rules also require reproduction (or supply) of any constitutional, statutory, ordinance, rule, or regulatory provision deemed relevant to the assignments of error.\(^4\) Such rules are typically supplemented by additional local rules concerning practice in the several appellate districts.\(^4\) One common local rule limits the length of any brief filed, usually to thirty or forty pages, except by prior permission of the court.\(^4\) While these local rules seem legitimate and in line with practice in other states’ appellate courts, it might be more appropriate to have a general rule which sets uniform standards statewide.\(^5\) A less common local rule requires


\(^4\)Ohio Const. art. IV, § 5(A)(a) (1) and (2).

\(^4\)See, *e.g.*, Black, *supra* note 90.

\(^4\)Ohio R. App. P. 16(A). Note that at times appellate cases are subject to early, or sua sponte, dismissal prior to briefing and oral argument, with the discovery of such cases bring the responsibility of the court’s staff. *See Letter from Judge Palmer, supra* note 96; *Letter from Judge Alan Norris to Professor Jeffrey Farness (May 14, 1982) (copy on file with Akron Law Review)*.

\(^4\)Ohio R. App. P. 16(E).

\(^4\)These rules are promulgated pursuant to Ohio Const. art. IV, § 5(B) ("courts may adopt additional rules concerning local practice . . . not inconsistent with the rules promulgated by the supreme courts"). For an example of a local rule supplementing the general rule on brief contents, *see* Ohio 1st Dist. R. 6. Recent changes in the Ohio R. App. P. provide for possible local rules regarding accelerated calendars. 55 O. St. Bus. Ass’N. Rep. 192 (1982).


\(^5\)For example, the federal circuit courts of appeals are governed by Fed. R. App. P. 28(g) which limits the number of pages in a brief, except by permission of the court.
briefs to be accompanied by copies of any unreported opinions which are cited. Again, the rule seems reasonable, prevalent elsewhere, and better left to a generally prevailing law.

A comprehensive rule for Ohio appeals courts on citation to unreported decisions has recently been proposed, and should receive serious consideration. The proposal contemplates that citations to unpublished decisions and opinions will be recognized only if complete copies are attached, a full disclosure is made of any known disposition by the Supreme Court of any appeal therefrom, and counsel certifies that also attached are copies of all other relevant Ohio unpublished appellate opinions and decisions that have come to his or her attention.

The general appellate rules in Ohio mandate that upon submission of briefs, a certain amount of time be allowed to litigants for oral arguments. Pursuant to the rules, each side is allowed thirty minutes for oral argument "unless otherwise ordered." Such orders are sometimes embodied in local rules which indicate only fifteen minutes of oral argument per side, unless the court permits additional time. One local rule indicates no oral argument will be heard in criminal appeals "except upon written motion supported by good cause." A litigant, or litigants, can waive their right to be heard orally, but any waivers by all litigants are subject to judicial veto.

Allowance of an opportunity for oral argument on appeal is not mandated by the federal constitution, and appears to be simply a matter of policy fur-

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151 "Ohio 8th Dist. R. 19.
152 It should be noted that in Ohio, there are differences in the handling of unreported opinions from district to district, Black, supra note 90, and that in the federal appeals courts, the matter of unreported opinions (unlike brief length) is subject to some variation. See Reynolds & Richman, The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167, 1180 (1978).
153 Letter from Judge Robert L. Black, Jr. to several Ohio appeals courts judges (November 6, 1981) (on file with the Akron Law Review). See also Black, supra note 90, at 492-94.
154 "Ohio R. App. P. 21(A) states: "The court shall advise all parties of the time and place at which oral argument will be heard." (emphasis added). And when, oral argument is not mandated, the rules are quite explicit. Consider Ohio R. App. P. 21(G) which says: "Oral argument will not be heard upon motions unless ordered by the court."
155 Recent experimentation with oral argument without preceding or subsequent briefs will not be addressed. See Deane & Tehan, Judicial Administration in the U.S. Court of Appeals for the Ninth Circuit, 11 Golden Gate L. Rev. 1, 15-16 (1981).
156 "Ohio R. App. P. 21(B)
157 "Ohio 1st Dist. R. 9; Ohio 6th Dist. R. 9; Ohio 8th Dist. R. 10; Ohio 9th Dist. R. 12; Ohio 10th Dist. R. 9.
158 "Ohio 2nd Dist. R. 2. The rule is a curious one, given Ohio R. App. P. 21(A) and (G), supra note 154. Perhaps, it is justifiable under the "unless otherwise ordered" provision of Ohio R. App. P. 21(B), supra note 155 and accompanying text.
159 "Ohio R. App. P. 21(E) (nonappearance of one party at oral argument does not foreclose another party from being heard).
160 "Ohio R. App. P. 21(F) (parties can agree to submit a case for "decision on the briefs").
161 See, e.g., Price v. Johnston, 334 U.S. 266, 280 (1948), where the Court said:
thered by the general appellate rules. \textsuperscript{162} Responses to the authors' survey indicated a variety of viewpoints on the continuing need, and the cost, of this policy. These responses reflect the varying visions of oral argument seen in contemporary commentary and appellate rule changes outside Ohio.

The policy regarding oral argument was strongly supported by a significant number of judges responding to the survey. A few indicated appellate oral argument constituted a crucial part of the right to a "day in court,"\textsuperscript{163} while others deemed it a "crucial step in the decisional process for judges"\textsuperscript{164} and necessary because of the possible changes of opinions on the merits prompted by such argument.\textsuperscript{165} Several judges supported the present policy as long as the court regularly exercised its ability to limit arguments to less than thirty minutes for each side.\textsuperscript{166} Two respondents supporting the policy restated the prevailing rule regarding counsels', rather than the court's, ability to waive argument.\textsuperscript{167}

However, a fair number of respondents expressed support for changes in the current policy on oral argument. A few suggested that counsel be required to request oral argument,\textsuperscript{168} with one noting the need for counsel also to include a "reason."\textsuperscript{169} Three indicated oral argument in at least some types of cases should be discretionary with the court.\textsuperscript{170}

Several responses regarding oral argument were quite interesting, and reflected the divisions of opinion on the state's policy. One judge found oral argument to be "of little help toward final resolution," yet believed it should

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Exceptional situations may arise where a circuit court of appeals might fairly conclude that oral argument by a prisoner in person is 'reasonably necessary in the interest of justice.' True, an appeal can always be submitted on written briefs. But oral argument, while not indispensable, is frequently if not usually desired by the parties.

Recent rule changes reflect recognition of the discretion of the federal circuit courts of appeals on the matter of oral argument. \textit{FED. R. APP. P. 34}(B) ("The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side"). And see \textsc{6th Cir. R. 9}(B) (establishing standards guiding determinations as to the availability of oral argument) and 9(C) (allowing parties to address in their briefs the reasons why oral argument should be made available).

\textsuperscript{162}\textsc{OHIO R. APP. P. 21}(A). We find no evidence of any explicit mandate in the Ohio Constitution that oral argument be made available. But consider \textsc{OHIO CONST. art. IV, § 3}(A) (requiring three judges of a court of appeals to participate in the "hearing" of every case). And note that the policy revails whether or not the appeals courts are "hot" or "cold." \textsc{Whiteside, supra} note 18, at § 19.08 (indicating that most Ohio appeals courts are "hot" in that briefs are read prior to argument). For validation of an oral argument policy different from that in Ohio, see \textsc{Sabatinelli v. Travelers Insurance Co., Mass.}, 341 N.E.2d 880 (1976); Mass. Appeals Court Rules for the Regulation of Appellate Practice, R. 1.28.

\textsuperscript{163}Responses of Judges 23 and 24.

\textsuperscript{164}Response of Judge 7.

\textsuperscript{165}Response of Judge 6.

\textsuperscript{166}Responses of Judges 4 and 8. The responses of Judges 12, 20 and 22 specifically mentioned a usual fifteen-minute time limit. \textit{Supra} note 156.

\textsuperscript{167}Responses of Judges 13 and 14.

\textsuperscript{168}Responses of Judges 15 and 21. See, \textit{e.g.}, Oklahoma Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, R. 3.7, and Okla. Rules of the Court of Criminal Appeals, R. 3.8.

\textsuperscript{169}Response of Judge 21.

\textsuperscript{170}Responses of Judges 9, 16 and 19.
REFORMS IN OHIO COURTS OF APPEALS

continue to be "a right." Another found it often "wasteful and redundant," but supported the present policy because the courts of appeals are usually the "courts of last resort." A third was "not persuaded that oral argument will change the disposition made by the court except in a rare case," but did "not favor elimination." Two other judges concurred in their finding that fifteen minutes is "about an irreducible minimum" of time for oral argument, and went on to state:

While it is true that most oral argument is relatively unproductive, I have seen too many instances where oral argument did in fact either define an issue or resolve an issue, to be tempted to further restrict the right. Although they should be so, briefs are not always as carefully or thoughtfully prepared that they may be relied upon entirely. Colloquy between court and counsel during oral argument frequently produces results both surprising and illuminating.

But, what if oral argument is not carefully or thoughtfully prepared — should other rounds of written and oral argument be held until there is care and thought? And, might not written arguments be better prepared if the opportunity for oral argument was not guaranteed?

The split of opinion among the Ohio appeals court judges on the policy of oral argument is similar to that found in contemporary commentary and appellate practice elsewhere. One recent commentary described the basis for the split as follows:

Recent literature shows tension between two divergent tendencies: to retain an essential practice, part of the 'procedural amenities' through which courts are 'seen to be obeying and enforcing the law,' and to curtail its use in some types of cases to facilitate its retention in others, where it is thought more useful.

Recent studies of both state and federal judicial attitudes regarding oral argument demonstrate the same general divisions of opinion on the utility of oral argument in all cases. These attitudes have prompted a rather wide variation in the ways in which appellate courts today provide for oral argument. One recent report indicates that while in some state intermediate appeals courts "few"

171 Response of Judge 11. Perhaps this can be rationalized by recognizing the importance of oral argument to the public's perception of an appeals court and to public confidence. Wasby, Oral Argument in the Ninth Circuit: The View From Bench and Bar, 11 GOLDEN GATE L. REV. 21, 68 (1981).
172 Response of Judge 17.
173 Response of Judge 18.
176 Wasby, supra note 175, at 348-52 (survey of certain federal appellate court judges, with a finding that lawyers also surveyed were generally less in favor of eliminating oral argument than were the judges); Simons, "Oral Argument of Appellate Cases: A Practice Worth Preserving?," 37 J. OF MO. BAR 369, 372 (1981) (survey of both certain federal and state appellate court judges).
cases are decided without oral argument, in other similar courts more than half the cases are resolved without such argument.\textsuperscript{177}

Notwithstanding these apparently dramatic differences, closer examination of the evidence and commentary outside Ohio demonstrates substantial agreement on certain occasions when elimination of oral argument by appeals courts is acceptable. One researcher summarized earlier comments in this way:

The Hruska Commission stated in 1975 that ‘to mandate oral argument in every case would be clearly unwarranted’... At about the same time, the Advisory Council on Appellate Justice recommended that ‘oral argument should be allowed in most cases’ but also conceded ‘it may be curtailed or eliminated in certain instances’... The American Bar Association’s... House of Delegates opposed ‘the rules of certain United States courts of appeals which... entirely eliminate oral argument in a substantial portion of non-frivolous appeals’ (emphasis added) (footnotes omitted).\textsuperscript{178}

The researcher went on to show that earlier surveys of federal circuit judges as well as lawyers also reflected agreement on the legitimacy of eliminating oral arguments in certain cases.\textsuperscript{179}

Assuming oral arguments are to be discretionary with an intermediate appeals court in some cases regardless of counsels’ desires, most would agree these cases include frivolous civil appeals or civil appeals whose results are clearly and fully governed by recent precedent.\textsuperscript{180} Regarding criminal cases, there is stronger sentiment that oral argument should occur even if the appeal is frivolous or simple and noncontroversial. Although usually useless, oral argument is seen as necessary in criminal cases to maintain a positive public perception of the court and public confidence in the court’s fairness.\textsuperscript{181}

The time is ripe for a change in Ohio’s policy on oral argument in its courts of appeal, and these courts should be given discretion to deny the opportunity

\textsuperscript{177}Marvell & Kuykendall, supra note 52, Table 9 at 36.

\textsuperscript{178}Wasby, supra note 175, at 351.

\textsuperscript{179}Id. at 351 (noting that about 90% of circuit judges surveyed by the Federal Judicial Center recognize occasions when elimination of oral argument is an acceptable procedure). Even some of those who oppose with “regret” the trend toward mandatory curtailment of oral argument, and label such a “misstep, advocate “invited waiver,” whereby the court “encourages avoidance of a useless proceeding,” i.e., oral argument. Carrington, supra note 54, at 16-17, 21.

\textsuperscript{180}Wasby, supra note 171, at 65. And see, e.g., 6th Cir. R. 9(B) (no argument in frivolous appeals, appeals involving dispositive issues recently authoritatively decided, and appeals where oral argument is not a significant aid); 10th Cir. R. 10(D) (no argument where no substantial question, manifest error, or no jurisdiction).

\textsuperscript{181}Wasby, supra note 171, at 65. And consider Carrington, supra note 54, at 58:

Appeals are an important part of the solemn process and symbolism that are vital to the legitimacy of criminal law enforcement. In overseeing trial court proceedings, appellate courts are special symbols of the respect our legal system accords to individual rights and concerns. They provide visible assurance to the accused and to society that the criminal law is being administered fairly and lawfully. Appeals symbolize deliberative, personalized consideration and a rejection of mass production methods and bargain basement justice that often afflict criminal trial proceedings. Appeals must be conducted in ways that insure that the reality is consistent with the symbolism.
for oral argument in all but exempted cases. Situations where discretion is denied should include capital and other major felony cases, as well as cases involving nonfrivolous federal or state constitutional questions. Further, the experimental prehearing conference programs should be used to assist appeals courts in exercising any newly-placed discretion to eliminate oral argument. The prehearing conference statement could be employed to discover not only which cases can be resolved without oral argument pursuant to attorney agreement, but also the reasons why counsel desires oral argument in cases which might otherwise appear to the prehearing conference's presiding officer, and others, to be unworthy. Recommendations on the need for oral argument should be made by the presiding officers at prehearing conferences in which no settlement is reached. These recommendations should be made according to criteria established pursuant to local court rule, and should be rejected upon the dissent of any member of the three-judge panel assigned the case.182

C. Posthearing

However a case becomes ripe for an Ohio appeals court decision (whether by discretionary or mandatory jurisdictional authority, with or without a prehearing conference, full briefing or oral argument), there are a number of ways in which such a decision can be rendered and a number of matters which such a decision can address. Again, the issues of economy, efficiency and fairness arise during consideration of possible reforms.

Regarding the manner of decisionmaking, present Ohio law is quite clear in many respects. For example, an appeals court’s hearing and disposition of any case must involve the participation of three judges.183 The three judges are responsible for determining the appeal “on its merits on the assignments of error set forth in the briefs . . . on the record on appeal . . . and, unless waived, on the oral arguments.”184 Finally, these judges must also pass upon in writing all errors assigned and briefed, “stating the reasons for the court’s decision as to each such error.”185

This final requirement, operative for about twenty-five years,186 is said to

182Godbold, supra note 89, at 864 (indicating comparable procedure the U.S. Court of Appeals for the Fifth Circuit); 5TH CIR. R. 18; 11TH CIR. R. 23(B). In Rhode Island, the Supreme Court hears orally (ten minutes), and by written argument (ten pages), from parties seeking rejection of a pre-briefing conference officer’s recommendation that a criminal case be resolved without traditional briefing and oral argument. “Supreme Court Provisional Order No. 16,” 30 R.I. B. J. 14 (1981); Weisberger, supra note 78, at 246.
183OHIO CONST. art. IV, § 3(A).
184Id.
185Id. To our knowledge, there have never been preliminary, or “tentative,” written rulings in Ohio to facilitate oral argument. Saeta, “Tentative Opinions,” 20 JUDGE’S JOURNAL 20 (Summer 1981). As with oral argument, supra note 162, passing in writing upon all assignments of error is not constitutionally mandated. As the U.S. Supreme Court recently said: “Undoubtedly, a court need not elaborate or give reasons or rejecting claims which it regards as frivolous or totally without merit.” Sumner v. Mata, 101 S. Ct. 764, 770 (1981).
186The requirement apparently first appeared in 1955. Compare 126 LAWS OF OHIO 58, § 1 (1955), with 116 LAWS OF OHIO 109, § 1 (1935). (The latter required that all assigned errors to be passed upon by the court, and that orders of reversal and remand for further proceedings contain statements of the error or errors
be based on the desire to “avoid a remand and another appeal” in those cases where the Supreme Court disagreed with, and overruled, a limited or “specific” ruling of a court of appeals.\textsuperscript{187} It could also be justified as a means of promoting more careful consideration by the appeals court\textsuperscript{188} and as a part of a litigant’s “day in court.”\textsuperscript{189} While these rationales possess some merit, they are not sufficiently convincing to compel support of the requirement. The requirement applies in all cases, including those where Ohio Supreme Court review is very doubtful,\textsuperscript{190} but the rule arguably does not significantly promote a more careful consideration than would otherwise occur. Instead, boilerplate reasons accompany decisions on many types of assignments of error. In opposing continued employment of this requirement, the chief concern is the valuable judicial (and nonjudicial) time spent on preparing the required writings.\textsuperscript{191} While the present requirement does provide some benefits, it also sacrifices benefits which

found in the record; the former required reasons for decisions — whether or not there is a reversal and remand. Compare the older cases of Freeman. V. State, 131 Ohio St. 85, 1 N.E.2d 620 (1936) and In re Wyson, 30 Ohio Law Abs. 316 (App. Ct. 2d Dist. 1939) with Smith v. Jaggers, 33 Ohio St. 2d 1, 292 N.E.2d 641 (1973).


\textsuperscript{188}Carrington, \textit{supra} note 54, at 31-32. \textit{See} \textit{Fed. R. Civ. P.} 52(a) (in non-jury trials, judges must “find facts specially and state separately its conclusions of law); Featherstone v. Barash, 345 F.2d 246, 249 (10th Cir. 1965) (Rule 52 seeks to evoke care on the part of the trial judge).

\textsuperscript{189}\textit{Supra} notes 162 & 181.

\textsuperscript{190}\textit{Supreme Court review is doubtful in most cases where review is discretionary. Oh} \textit{io Const. art. IV, § 2(B)(2). \textit{See} \textit{Black, supra note 90, at 480 (“the vast majority of cases terminate at the court of appeals level”). \textit{See also} State v. Jennings, 69 Ohio St. 2d 389, 1 N.E.2d 641 (1982) (finding the requirement applicable to assignments of errors the appeals court found irrelevant).

\textsuperscript{191}\textit{The requirement also inhibits experimentation with other manner of decisionmaking. For example, in some appellate courts decisions are announced from the bench immediately after oral argument. \textit{Stern, supra note 71, at 384 (citing \textit{Efficiency and Justice}, \textit{supra note 111). Such a procedure may well not only save the judges the time of preparing a written decision addressing all assigned errors, but also provide the litigants with a much earlier notice of the resolution of their case. See the Response of Judge 25, concurred in by the response of Judge 5, advocating this procedure in “appropriate criminal appeals.” Also consider the Oklahoma high court’s adoption of the “fast track” concept. \textit{See} \textit{Perry, The Fast Track: Accelerated Disposition of Civil Appeals in the Oklahoma Supreme Court, 8 Okla. City U. L. Rev. 453 (1981); Hufstedler & Nejelski, \textit{ABA Action Commission Challenges Litigation Cost and Delay, 66 A.B.A.J. 965, 967 (1980).}

We are convinced that appellate judges are able to distinguish cases deserving written opinions from those that do not. In a recent study of the operation of a rule permitting an intermediate appeal court to affirm, without published written opinion, the authors concluded:

Critics seem to have found some instances of written but unpublished opinions that appear to have potential precedential value. Perhaps even the Fifth Circuit’s practice has suppressed some affirmations that, had opinions been written, might have had precedential value. The evidence and analysis in this study, however, suggest that such instances are probably quite infrequent. If the purpose of Rule 21 is to speed the appellate judicial process without a significant loss of precedential opinions, and if that process is viewed as a group activity, adjudicating large sets of repetitive events, then the laments of the critics of Rule 21 seem more sentimental than rational. (footnote omitted).


Finally, consider Judge Weisberger’s remark that “justices of many appellate courts literally have been driving themselves to the brink of intellectual and physical exhaustion by attempting to increase their opinion output rather than pursuing remedies through alternate decisional modes.” Weisberger, \textit{supra} note 78, at 249.
may be of more importance, particularly given the limitations on the availability of law clerks and other parajudicial personnel. Perhaps the requirement might be modified regarding some, but not all, types of cases.

As with the topic of oral argument, responses to the survey indicated a divergence of opinion on the continued need for the requirement of a written reason for the court's decision as to each assigned error. And, like oral argument, several of the responses provided interesting reflections on the relevant tension between the beneficial aspects of the requirement and the limitations on judicial and nonjudicial time. One judge commented on the requirement as follows:

In principle, it has merit because counsel should know the basis for a court's opinion. However, it has become burdensome because of lawyer abuses and the lack of a definitive ruling from the Supreme Court as to its requirements.

Other judges concurred as follows:

App. R. 12(A) is doubtless a burden in many routine cases. Where we conclude that an assignment of error is wholly without merit, there is little incentive to waste valuable time listing the reasons why it is meritless. If the entire appeal is similarly meretricious, the motivation is even less to waste time on its disposition. I suspect there is substantial support among my brothers throughout the state for some formal relaxation of the rule. Nevertheless, I would oppose any substantial change. First . . . the per curiam affirmance . . . inevitably left counsel and litigants wondering to what extent the court had truly examined the issues. I have always felt . . . that judicial indifference or inattention, or even the suspicious (suspicion?) thereof, was never (tolerable). . . . Second, the Ohio Supreme Court appears to be satisfied by a graceful nod in the direction of App. R. 12(A), so that the rule is not really as onerous as might be supposed.

Assuming the aforesaid manner of decision-making remains so that written decisions emanate in appellate determinations, issues remain regarding what these decisions should address beside the assignments of error. One such issue involves whether the court's decision is to be published. Another concerns the conditions under which costs, or sanctions, should be imposed on any of the litigants or lawyers involved in the appeal.

The current Ohio practice regarding publication of appellate court opinions recently has been comprehensively and thoughtfully analyzed elsewhere.

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192 Compare responses from Judges 5, 7, 14, 17, 18, 19, 20, 21, 22, 23, 24, and 25 (supporting the present requirement), with responses from Judges 6, 11, 12, 13, 14, 15, and 16 (suggesting some change in the requirement).
193 Response from Judge 8.
194 Response from Judge 25, concurred in by Judge 5's response.
195 Black, supra note 90.
An apparent outgrowth of that analysis is the pending proposal regarding pro-
mulgation of a new appellate rule on the criteria to be used in determining which
opinions are to be published.196 Inter alia, the proposal contemplates publication
of decisions which establish new rules of law or modify existing rules, “apply
an established rule of law to facts significantly different from those in previously
published applications,” elaborate on the history of an existing rule, create or
resolve a conflict of authority, concern issues of significant public interest, or
conceiv significant legal issues about which there exist concurring or dissenting
opinions.197

Survey responses indicated some support for, and no opposition to, a new
rule establishing criteria for the publication of appeals courts’ decisions.198 One
judge, after finding “Ohio’s failure to publish the opinions of its courts of ap-
peals” to be “a matter of great importance that has received little attention,”
going on to state:

I think of the effect of unresolved inconsistencies and conflicts not only
between the twelve districts but within them individually, and the effect
of underpublication on the quality of the judicial product as well as on
public and professional confidence. Further, I would suggest that under-
publication may have some effect on the recruitment and retention of high
quality professionals in our judicial system, particularly when combined
with salaries and support systems that have been dramatically eroded by
inflation.199

Another judge observed that Ohio was “desperately” in need of a new system
for publication of appeals courts’ decisions.200

Regarding costs and sanctions, the real threat of their use should cause
a decrease in the numbers of frivolous, and marginal but nonfrivolous, ap-
peals. Presently, one Ohio appellate rule requires that if an appeal is dismiss-
ed, “costs” are to be taxed against the appellant, “unless otherwise agreed by
the parties or ordered by the court.” Costs otherwise are made subject to court
order, though the absence of any order triggers the taxing of costs against a
wholly losing party.201 A second rule grants appellate courts the discretion to
“require the appellant to pay reasonable expenses of the appellee including at-
torneys fees and costs” upon a determination that “an appeal is frivolous.”202
Yet, it does not appear that these rules are utilized to deter the filing of in-
substantial appeals. In perhaps a somewhat exaggerated statement, one respon-
dent to the survey lamented:

196 Supra note 153.
197 Id. Proposed Rule 25(A) at p. 3.
198 Responses from Judges 5, 6, and 7.
199 Response from Judge 5.
200 Response from Judge 6.
201 OHIO R. APP. P. 24.
202 OHIO R. APP. P. 23.
In my opinion, a large share of this increase of numbers of appeals results directly from the inability and, in most cases, unwillingness of lawyers to discourage clients from appeals which must be fruitless on their merits. The most frequently recurring significant example of this is the failure of counsel intelligently to explain to his client that a Court of Appeals is not a "super jury" before which he will get a second chance to argue who is telling the truth. It is professionally disturbing to me that the circumstances indicate that this flows directly from economic pressure on increasing numbers of lawyers coupled with decreasing number of worthwhile cases.

It appears that to some significant extent the judiciary is pressured into silence about this subject because of the already severe public criticism of the profession generally. . . . We do have serious problems, but in my opinion their solution lies beyond tinkering with the appellate rules.

I am certain that much of the problem about which I speak is a result of recent rulings of federal courts expanding the malpractice exposure of lawyers, especially those appointed to represent indigent prisoners, as well as changes in concepts of judicial and professional immunity which encourage lawyers to take the fruitless appeal rather than bear the burden of explaining later why they did not.

In short, it appears that the mess we are in did not come upon us quickly and it will be a very long time before we can work our way out of it.\(^3\)

Of course, utilization of these Ohio rules causes clients to pay for their attorney's agreement, and perhaps strong advice, to pursue appellate review.\(^4\) While no Ohio appellate rule addresses attorney financial and professional responsibility regarding the avoidance of insubstantial appeals, there is comparable precedent for such duties. For example, pursuant to the civil procedure rules in many jurisdictions, trial courts can order payment of reasonable expenses, including attorneys fees, by attorneys advising clients who fail to obey

\(^3\)Response from Judge 14. And note the recent U.S. Supreme Court pronouncement: "It is the obligation of any lawyer ... not to clog the courts with frivolous motions or appeals." Polk County v. Dodson, 102 S. Ct. 445, 452 (1981) (footnote omitted).

\(^4\)In Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2nd Cir. 1979), the court said:

where gross professional negligence has been found — that is, where counsel clearly should have understood his duty to the court — the full range of sanctions may be marshalled. Indeed, in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where, as in this case, they are clearly warranted.

A litigant chooses counsel at his peril ... and here, as in countless other contexts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim. (footnote omitted)

It would be with the greatest reluctance, however, that I would visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation.

\textit{Id.} at 1069 (Oakes, J., concurring).
an order to provide or permit discovery\textsuperscript{205} or who fail to respond to legitimate discovery requests.\textsuperscript{206} And, other civil procedure rules allow trial courts to take "disciplinary action" against attorneys who willfully file pleadings which they know are without "good ground to support."\textsuperscript{207} In the federal appeals courts, attorneys can be subject to "disciplinary action" for conduct unbecoming a member of the bar or for failure to comply with the federal rules of appellate procedure or for failure to comply with any local court rule.\textsuperscript{208}

The Ohio appeals courts' failure to impose sanctions to deter unmeritorious actions is not unique. One study of discovery practices of Chicago area civil litigators found:

The widely shared impression that if judicial intervention occurs at all it is likely to be superficial also reportedly encourages discovery abuse . . . . The characteristic of judicial responses to discovery problems which was by far the most often cited as encouraging discovery abuse, however, is the courts' studied reluctance to impose sanctions. In fact, many litigators apparently would go a step further and suggest that the infrequency and the leniency with which courts use their sanctioning power is the root cause of discovery abuse. Such lawyers would argue that it is the relatively minimal risk of sanctions that sets cycles of abuse in motion. According to this theory the absence of a real threat of sanctions creates a restraint vacuum that sucks litigators into temptations too great to resist. Attorneys who are under acute time constraints, or who are saddled with weak positions, or who are vulnerable to pressures from clients, and who believe there is little likelihood of being punished for a violation of the rules may not have the will to forgo an opportunity to attempt to gain an advantage through a violation. Lawyers also observed that the relative rarity of sanctions permits abuses to beget additional abuses. Several litigators described their own willingness to respond in kind after an opponent has attempted to abuse the tools of discovery. Some attorneys also reported being pressured by their clients to use discovery as a retaliatory weapon to harass or burden opponents who the clients believe have used discovery tools unfairly. Finally, it should be noted that the remoteness of restraint by the judiciary leaves considerable room not only for clear abuses but also for the extensive tactical jockeying which, at least in the large cases, appears to contribute significantly to the inefficiency of the discovery process (cite omitted).\textsuperscript{209}

\begin{itemize}
\item \textsuperscript{205}See, e.g., FED. R. CIV. P. 37(B)(2); OHIO R. CIV. P. 37(B)(2).
\item \textsuperscript{206}See, e.g., FED. R. CIV. P. 37(D); OHIO R. CIV. P. 37(D).
\item \textsuperscript{208}FED. R. APP. P. 46(C).
\item \textsuperscript{209}Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 A.B.F. RES. J. 219, 249-50. For similar recent observations, see Porter, Discovery Abuse,
New thought should be given to the role of costs and sanctions in Ohio’s appellate courts. One appropriate way would be district by district consideration of possible new local rules regarding the manner in which the current general rules on costs and sanctions are to be employed. With such local rules, an individual panel’s discretion would be limited, a more uniform and recognized policy would prevail, and differences in attorney practice from district to district would be accommodated.

V. Conclusion

In the upcoming years the Ohio courts of appeals will need to consider, and initiate or help to initiate, new ways of fulfilling their role as the courts of last resort for most Ohio litigants. In doing so, consideration should be given to changes in these courts’ business and operating manners, since further increases in judicial officers alone cannot assure satisfactory role fulfillment. Judicial responses to a survey on possible reforms indicate wide differences of opinion on areas suitable for change. Such differences, together with the variations in legal practice in the Ohio districts and the largely inconclusive returns shown by the studies of recent reforms in other appellate courts, indicate a need for much local appellate court experimentation.

Regarding the business of the courts of appeals, serious thought should be given to eliminating the “one trial, one review” principle in many types of cases. With respect to the courts’ operating manners, possible alterations in the prehearing, hearing and posthearing stages merit discussion. Such alterations include increased employment of prehearing conferences, promulgation of a general rule on citation to unreported decisions and on publication of opinions, restrictions on the opportunity for oral argument, elimination of the need for written decisions in certain cases, and more use of the courts’ sanctioning powers.

While no panacea appears for the substantial difficulties caused by the continually-increasing case filings in the Ohio courts of appeals, some action is needed now. As Chief Justice Burger said when proposing consideration of certain changes in the federal courts of appeals, “In this as in all other matters relating to procedures, methods and practices, it is far better that we should risk some false starts rather than make no starts at all.” Hopefully, this article will aid in the discovery of the most appropriate action to be taken, while prompting few, if any, false starts.


8 An illustration of an appeals court’s local rule on sanctions is 8th Cir. R 16(E), which allows imposition of $250 in costs when counsel files a frivolous petition for rehearing en banc, and which is accompanied by a Rule, 8th Cir. R. 16(C), that establishes guidelines for determining which appeals are even potentially suitable for a rehearing en banc. And consider the proposal in Oberman, supra note 88, at 1073.

21 Burger, supra note 71, at 1127.
APPENDIX

The following is a reproduction of the survey letters sent by the authors to the Ohio appeals court judges:

Dear Judge

I am writing to you regarding the operation of the Ohio Court of Appeals. I recently joined two of my students in deciding to examine briefly the operation of the Court; should this initial review reveal areas of general concern, we are committed to a more detailed exam whose results we hope would appear in a published study. As part of our preliminary effort, we are conducting an informal survey of the Court’s judicial officers.

During our early investigation we have focused on several Appellate Procedure rules and raised questions thereon, including:

1. Rule 12(A). Is the requirement of passing upon each assignment of error in writing needlessly burdensome; and if so, should there be a return of the option of summary disposition?

2. Rule 20. Could prehearing conferences be used more extensively; and if so, to what ends?

3. Rule 21. Should oral argument be made discretionary with the Court in all or some types of cases?

We have also tried to focus on areas ripe for a rulemaking effort. For example, we have considered whether there should be a rule against citation of unreported decisions. Finally we have focused on the increasing caseload handled by the Court of Appeals and the mechanisms developed to cope with the additional volume. We were prompted by the recognition that case filings and terminations for the Court have more than tripled in the past fifteen years, far surpassing the increase in the number of new judges.

We would greatly appreciate your thoughts on our undertaking to date, together with any suggestions you wish to share regarding other possible means of improving the operation of the Ohio Court of Appeals. We thank you in advance for your interest and assistance.