

July 2015

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Recommended Citation

Day, Jack Grant (1983) "Response to Professor Parness and Mr. Reagle," *Akron Law Review*: Vol. 16 : Iss. 1 , Article 3.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol16/iss1/3>

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RESPONSE TO PROFESSOR PARNES AND MR. REAGLE

by

THE HONORABLE JACK GRANT DAY*

I SUBSCRIBE TO SO much of the reform suggestions proposed by the authors that I believe my response can be most useful if confined to some emphasis or expansion of concurrent views, specific reference to disagreements and support for points of reform needed but not recommended.

I. ADDITIONAL JUDGES

Adding judges has at least three defects of consequence. First, it entails the addition of the most expensive personnel in the system. If more manpower is the chosen way toward docket reduction, it is arguably more efficient and less expensive to develop a career staff of lawyers to prepare the less significant cases for presentation to a panel of the court. This approach would both release the judges from the detail of preparation and insure time for judicial consideration and disposition.

Second, the greater the number of judges the greater the likelihood that collegiality will be diminished. The merits of collegiality rest with the probability that a multi-judge panel will bring more wisdom and experience to the task of review, that disparate viewpoints will introduce a balancing factor to the judgmental process and, whether unanimity is achieved or not, the participation of more than one judge adds an element of verification which tends to assure litigants that the review has been thorough. At least the first two of these objectives are enhanced if the reviewing judges work together with sufficient frequency and duration to acquire confidence and respect for one another. Such accomplishments are rendered more difficult in direct proportion to the numbers.

Finally, adding judges to solve the problems of case overload is at once too simplistic and short term. For it does not get to the root of the problem. That is, it does not impede the flow of the great number of appeals which, frivolous or not, are of relative insignificance. A better, though not necessarily permanent, cure for a swollen backlog is a system of permissive appeals.

II. PERMISSIVE APPEALS

For a system of permissive appeals to function with maximum utilization of judicial personnel and minimum attrition of justice, a process for differentiating the importance of cases is required. Obviously, reasons of economy prevent every case laying equal claim to appellate resources. To determine legitimate priorities a screening procedure is necessary to select cases for review.

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A motion to certify at the intermediate appellate level would trigger the screening review and provide parties the opportunity to define the importance of issues to warrant appellate consideration. The motion practice would provide considerable assurance that the small case with significant issues would not be lost between the cracks.

Another safeguard can be provided by retaining the absolute right to appeal in felony cases, misdemeanors implicating incarceration, and civil cases involving judgments affecting assets of more than a specified amount, say \$25,000.00. This retention would impede, if not eliminate, the worst aspects of judicial fallibility, arbitrariness or lethargy.

III. THE PRE-HEARING CONFERENCE

This approach to time saving must be based upon at least a minimal amount of pre-hearing information and a careful selection of persons to conduct the pre-hearing conferences. The conference may be largely a mediation process, especially on the merits. And not every person is equally endowed with mediation motivation and skill. But even the least accomplished conciliators can help shorten the appellate process by dealing with such issues as the reduction of the number of assigned errors, the size of the briefs, the consolidation of cases, and the waiver of argument. Even when the settlement of substantive issues is not achieved then it may be possible to get agreement on an order shortening the procedural lines for the case through its remaining life on appeal.

It is no argument against pre-argument conferencing that it may be necessary to involve judges in it. If the process, assisted by judges, results in as many or more case terminations as would be effected in the conventional process, then the backlog does not grow. In addition every settlement saves court time and litigants' money. A properly scheduled conference begins before the parties or the court have invested money or time in appellate preparation. Few conferences will be totally without beneficial results. As previously noted, when merit settlement fails agreements shortening the conventional process may be achieved.

The financing of pre-hearing conferences raises no insuperable problems. In the first place, there are few additional monies that need be spent by the parties to satisfy the submissions needed. Furthermore, when court personnel, including judges, are conductors of the conferences, there is no additional expense to the court.

IV. A GENERAL RULE ON THE LENGTH OF BRIEFS

A limit on the size of briefs (subject to motion for a permitted excess) is a general problem and requires a general solution by a state-wide rule. Few appellate issues or groups of issues cannot be addressed within a forty-page limit. The existence of the limit will require counsel to refine the points to be briefed and tend to squeeze out both repetition and prolixity.

V. THE UNREPORTED OPINION

If the citation of an unpublished opinion is to be countenanced at all,¹ a general rule requiring that unreported opinions be used only if copies accompany the brief is a condition demanded by fairness. Many lawyers do not have systematic access to unreported opinions and there is no existing way to assure it. Few libraries will have the thousands of unreported decisions on hand, with or without, an adequate index. It seems unlikely that computerized services can develop and market the unpublished opinion data at a price that will warrant the expenditure, at least for the small practitioners.

But there is more to be said; an opinion has narrow objectives. The first objective is the resolution of the dispute, while the second is the explanation for it. The third objective, incidental to the first two, may announce new, novel, or modified principles and provides the only excuse for print. Only innovation needs open chronicling. Otherwise, publication amounts to little more than a tedious and unnecessary repetition of precedent already well established and well known.

Apart from an argument that an opinion worth citing ought to be worth publishing, there are other publication advantages.² These include: (1) the discipline which the necessity for writing imposes; (2) the incentive to do a thorough and serious job because it may become a guide to future dispositions and has a lasting memorial in the books; and (3) since the intermediate court of appeals is the court of last resort in many cases in Ohio, it is important that the principle creating function of that court be reflected in a place that is easily available for review and analysis.

Thus, strong arguments can be mounted in favor of publication coupled with a prohibition against citation of any unpublished opinion. This rule can be implemented by incorporating minimal or no facts in the text. To avoid random proliferation, the publishing decisions should be made according to guidelines taking account of such precedent affecting considerations as novelty and overruling.³

Expanded publication accompanied by a "no citation" rule for the unpublished opinion would eliminate at once both the fairness problem posed by non-access and the financial burden entailed in developing a separate access system for collation and indexing.⁴

¹See Black, *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 UNIV. OF CINN. L. REV. 477, 492-94 (1981), for a canvass of the possible ways of dealing with the unpublished opinion.

²On the use of the unpublished opinion, see R. LEFLAR, *APPELLATE JUDICIAL OPINIONS*, 313-14 (1974). On the same subject, see AMERICAN BAR ASSOCIATION TASK FORCE ON APPELLATE PROCEDURE, *EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS* 107, 109, 111, 113, 115 (1977).

³See FCJ RESEARCH SERIES NO. 73-2 *reprinted in* LEFLAR, *supra* note 2, at 315-19 and in Black, *supra* note 1, at 486-92.

⁴The offsetting of costs between publication and unpublished collation and indexing can be readily determined. The size of the difference may affect the publication policy decision.

VI. WRITING ON EVERY ASSIGNMENT OF ERROR

It is obvious that even in an unreported case there is some merit in informing the parties of the basis for the ruling of the court. This is a far cry from the requirements of Rule 12 of the Appellate Rules of Procedure which mandate that each assignment of error properly presented be answered in writing. The rule effectively converts the Court of Appeals judges into clerks for the Supreme Court of Ohio but is extraordinarily profligate of the time and use of persons whose judicial expertise could be much more fruitfully employed in other ways, *e.g.*, spending more time on serious points crucial to decision and more relaxed time on complex cases.

Moreover, the program of writing on every assignment of error is against the tendency in the country to reduce the amount of paper generated by appeals, especially in those cases which have no compelling precedential value.

VII. ORAL ARGUMENT

Oral argument ought to be maintained in order to throw light into dark places, verify conclusions reached from reading the briefs, and to give the parties a sense of a fair hearing. The cost factor is inconsequential. Hearings take up very little judicial time.

The right to waive argument, especially if coupled to a permissive right to appeal, should be the option of counsel. The court should not be given discretion to deny the opportunity for oral argument except in certain exempted cases. After all, the case at issue belongs to the parties and not the court. The latter's principal interest is in full formation. If the parties feel oral argument is necessary to inform the court, then they should have it. However, the court should have the right to override a waiver if it feels a particular case needs oral explication. Even where counsel is not well prepared, the questioning from the bench frequently elicits some information to enrich the decisional process.

There is no reason to believe that written argument is universally more carefully prepared than oral argument. One of the truisms of appellate experience is the ubiquitous mediocrity of the appellate brief. Even when the case cries out for no oral argument, if the case is to be heard at all, it should not be cut off by judicial fiat. For to do so, gives the lawyers, and vicariously their clients, the impression that there has not been a full consideration of the case. Even if this conclusion is overbroad, a possible inference is always present and a lurking distrust may be just as dangerous as an overt one. This observation has particular point in criminal cases.

VIII. FRIVOLOUS APPEALS

Until frivolous appeals have an incidence much greater than now, attack on the problem through the disciplining of the lawyers should not be undertaken at all unless there is a flagrant dereliction by counsel. In the latter case correction can be — and maybe should be — pursued in disciplinary proceedings out-

side the perimeters of a case. In no event should new sanction powers be sought until efforts within the limits of Appellate Rule 24 have been exhausted.

A caveat is in order. One has to tread carefully in penalizing any aspect of litigation because there is so much room for differences of opinion. What is necessary and what is not in the preparation of a lawsuit or in the conduct of an appeal is very often the result of highly refined judgment. A court has to be careful not to discourage what counsel discerns as a legitimate tactic or claim. Given the respective amounts of time counsel and the court should have invested in the case, the lawyer may have a better informed concept of legitimacy than the court.

IX. END PIECE

Professor Parness and Mr. Reagle set themselves the subject *Reforms in the Business and Operating Manner of the Ohio Courts of Appeals*. They have worked well within the confines of the subject and cannot be faulted for staying within bounds. It is no flaw for a shoemaker to stick to his last. Perhaps some day their "last" will be enlarged to involve suggestions for a more fundamental structural reshaping of the Ohio court system.

