

ANDERSON'S OHIO CIVIL RULES PRACTICE WITH FORMS

2009 EDITION

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and

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MATTHEW  BENDER

FOREWORD TO THE FIRST EDITION

Dean John W. McCormac has been actively engaged in the Civil Rules project from the very beginning to its successful conclusion. In the summer of 1968 he was appointed as a member of the Rules Advisory Committee, he being the only member of a law faculty to be so appointed. During the months September through December, 1968, he participated, as a member of the Committee, in the extensive committee meetings which formulated the basic rules package. These meetings occurred at approximately three-week intervals and remained in session for several days and far into each night. During these same months Dean McCormac was also chairman of the rules subcommittee which formulated the rules in Title VIII, Rules 64 through 71, governing provisional and final remedies.

In late December, 1968, the Rules Advisory Committee submitted the basic rules package to the Supreme Court. But time did not permit the Court the opportunity thoroughly to review the rules before the January, 1969, legislative session. Hence, the Court decided to delay the submission of the rules to the legislature until January, 1970, so that a thorough review might be undertaken.

In January, 1969, the staff of the Rules Advisory Committee set about preparing staff notes which would aid the Supreme Court in undertaking the review of the rules. At this point Dean McCormac was invited to become a consultant to the Rules Advisory Committee staff—as a practical matter to become a staff member. Along with the staff members Dean McCormac set about drafting staff notes. In addition, during the period from January through April, 1969, Dean McCormac became a very active member of a Rules Advisory subcommittee which assumed the responsibility for correcting certain inconsistencies discovered in the rules package as submitted to the Court in December, 1968.

In April, 1969, the Supreme Court invited members of the Rules Advisory staff and Dean McCormac to aid the Court in its rule by rule review of the entire rules package. These all-day rule review sessions occupied the Court, usually one day per week, in the spring and fall of 1969. During these conferences the Court recommended many changes in the rules. Dean McCormac and the staff drafted the suggested changes and submitted the changes in memorandum form for the Court's approval. It should be noted that Dean McCormac undertook the extensive redrafting of the venue rule, Rule 3. This significant rule, effecting a substantial change in Ohio practice, reflects Dean McCormac's legal draftsmanship. Dean McCormac, at the request of the Court, also drafted Rule 19.1, the rule governing compulsory joinder in certain derivative actions. Finally, Dean McCormac, at the request of the Court, was instrumental in the redrafting of Rule 75, the rule governing procedure in divorce, annulment and alimony proceedings.

In the spring of 1970, Dean McCormac participated in redrafting and correcting many of the staff notes which are to be published in July, 1970.

The review of Dean McCormac's activities in the formulation of the Rules of Civil Procedure establishes his credentials as the knowledgeable author of the book at hand, OHIO CIVIL RULES PRACTICE.

In selecting the format for his book, Dean McCormac has chosen wisely. His book is a practice manual. In short, his book is a practice-oriented treatise by a lawyer, for the lawyer, from the lawyer's point of view. Dean McCormac has recognized that a rules system is not a compendium of isolated rules; rather it is an integrated whole involving an interrelated series of procedural steps from

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commencement of the action through the entering of judgment. The format of his book emphasizes the interrelationship of the rules.

Unlike Dean McCormac's approach, the average rules treatise emphasizes a particular subsection of a rule and discusses that subsection in isolation before proceeding to the next succeeding rule. Hence, the lawyer may be well informed about a particular subsection, but he has not been informed about other procedural options available to him. Under the traditional approach an author may, for example, discuss the form of motions under Rule 7(B) and then move on to Rule 8, the pleading rule. The juxtaposition of the form of a motion and the form of a pleading is not a practice-oriented approach. In contrast, Dean McCormac discusses in a complete chapter all of the ramifications of motions and the interrelationship of motions to the remaining body of rules, be these rules concerned with pleading, discovery, or trial procedure. Understanding the interrelationship in chapter- long discussions of service of process, venue, pleading, joinder of parties and actions, discovery, and trial procedure is the McCormac approach—the necessary approach from the lawyer's point of view.

Dean McCormac's book is quite readable; hence the lawyer would be well advised to read entire Chapters. He will be rewarded with an integrated knowledge of the rules and confidence in his ability to practice under the rules.

In conclusion, I might note that it has been my pleasure to work with Dean McCormac during these many months devoted to the rules project. I respect Dean McCormac's scholarship and his capacity successfully to complete difficult tasks assigned to him.

Stanley Harper
Staff Director, Rules Advisory Committee
University of Cincinnati
College of Law

PREFACE

In his Foreword to the first edition of Dean McCormac's book, *Ohio Civil Rules Practice With Forms*, my retired colleague, Professor Stan Harper, emphasized that the book "is a practice manual . . . a practice-oriented treatise by a lawyer, for the lawyer, from the lawyer's point of view." This remains true of the third edition. It is meant to aid the practitioner, and the judiciary, in answering questions of civil procedure arising mainly at the trial level. Lengthier discussion of the issues raised, and other forms, can be found in Anderson's *Ohio Civil Practice* series. Dean McCormac produced the first two editions of this book in 1970 and 1992, respectively. The accretion of case law and amendments to the Ohio Rules of Civil Procedure, since then, mandates this new edition. The prior two editions have been cited scores of times by the Ohio Supreme Court, and lower courts in Ohio. I am hopeful that the third edition will match the quality of the first two.

Thanks are due to Anderson Publishing Co. for their tremendous help in producing the third edition, particularly the considerable efforts of Senior Editor Rod Mortimer.

Michael E. Solimine
Donald P. Klekamp Professor of Law
University of Cincinnati College of Law
October 2002

PREFACE TO THE SECOND EDITION

Common law pleading was used in Ohio from 1803 until 1853, when a code pleading system, modeled after the Field Code in New York, was legislatively adopted. The basic form of this system remained in effect until July 1, 1970, when the Ohio Rules of Civil Procedure, promulgated by the Supreme Court of Ohio by authority of the modern courts' amendment to the Ohio Constitution, became effective. After twenty-two years under this system, we are no longer in a transition phase and the pleading and procedure used for civil cases under the common law and code pleading systems have virtually become ancient history.

While the Ohio Rules of Civil Procedure resemble the Federal Rules, they are also different in many respects. Federal courts are much more limited in jurisdiction. For that reason, the Ohio rules were revised to accommodate all types of actions entertained in our courts. So far as possible, the rules were made uniform for all Ohio courts. New ideas not yet in effect in the Federal Rules were incorporated in the Ohio rules and Ohio statutory provisions were used when superior to federal provisions. In other words, the Federal Rules were a guide only and the final product was truly the Ohio Rules of Civil Procedure.

My initial book in 1970 was designed to help practicing lawyers and judges bridge the gap between the code pleading system and the Ohio Rules of Civil Procedure. The principal differences between these systems were highlighted and extensive explanation was provided to show the procedure to be used under the Civil Rules as compared to what was used under the code pleading system. Strong reliance was placed upon decisions of the Federal Courts interpreting the Federal Rules of Civil Procedure since many of the provisions of our rules were based upon the Federal Rules. Of course, we had no body of case law interpreting our rules to rely upon at that time.

The gap has been bridged. Lawyers and judges no longer look back to what was done before the Civil Rules were adopted. Most of the important provisions of the Ohio Rules of Civil Procedure have been interpreted and applied by Ohio appellate courts in the thousands of reported cases which discuss the Civil Rules, their meaning and their use in everyday practice. Consequently, it is no longer necessary to rely heavily upon federal courts' interpretation of the Federal Rules of Civil Procedure. Instead the primary emphasis is on what the Ohio Supreme Court and courts of appeals have said concerning our Civil Rules.

While pleading and practice has been simplified under the Ohio Rules of Civil Procedure, a review of the many cases interpreting the rules will readily demonstrate the fallacy of any argument that lawyers and judges need not be well-informed about or diligent with the use of the Civil Rules. The knowledge of Civil Procedure is as important as it ever has been if the interests of clients are to be served and justice is to be provided. Properly used, the Civil Rules result in a more just disposition of legal disputes but the adversary system has not been eliminated and it is very important that those using the rules do so with intelligence and foresight.

My goal, both with my first book and with this book, is to provide the practicing lawyer and judge in Ohio with a desk manual to find quick and correct answers to procedural questions under the Civil Rules. Normally the lawyer or judge can simply refer to the appropriate section of this book and the answer to a particular problem will be provided by reference to the Civil Rule upon which it is based and to supporting Ohio cases interpreting the particular use of that rule. The book recognizes that a rule system is not a compendium of isolated rules but that it is an integrated whole involving interrelated series of procedural steps from the commencement of the action through the entering of judgment. Hence, the rules are not discussed in isolation in numerical order but are tied together in an

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integrated way. Thus, when motions are discussed, any provision of the Civil Rules that relates to motions will be discussed in that chapter, thus shortening the search for relevant answers to a problem and making it much easier to avoid overlooking allied concerns.

Illustrative forms are provided to demonstrate the practical application of the rules. However, a complete set of forms are not provided and the book is cross-referenced to forms contained in Anderson's excellent Ohio Civil Practice set.

Finally, I would be remiss if I did not express my great appreciation to my secretary, Linda Lash, for her very dedicated work in helping me complete this Second Edition of Ohio Civil Rules Practice.

John W. McCormac

March 1, 1992

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