

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.**

*Appel Code
Rules,*

**ALBERT B. MARIS
CHAIRMAN**

**AUBREY GASQUE
SECRETARY**

CHAIRMEN OF ADVISORY COMMITTEES

**DEAN ACHESON
CIVIL RULES**

**PHILLIP FORMAN
BANKRUPTCY RULES**

**JOHN C. PICKETT
CRIMINAL RULES**

**WALTER L. POPE
ADMIRALTY RULES**

**E. BARRETT PRETTYMAN
APPELLATE RULES**

February 20, 1961

*Mailed to
members of Committee
standing 2/20/61*

**MEMORANDUM TO MEMBERS OF THE
COMMITTEE OF PRACTICE AND PROCEDURE**

There is enclosed a progress report of the Advisory Committee on Appellate Rules. Judge Prettyman asked me to say that the report has been circulated to the members of his Committee and has been approved.

A.G.
**Aubrey Gasque
Secretary**

To: COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Gentlemen:

I have the honor to present the following progress report on behalf of the Advisory Committee on Appellate Rules.

The first plenary meeting of this Committee convened in the Supreme Court Building on January 30, 1961, at 9:30 a. m. All members of the Committee were present. The Chief Justice was present during a part of the meeting and addressed the Committee briefly. Others attending were Senior United States Circuit Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Circuit Judge Charles E. Clark and Professor James William Moore, members of the standing Committee; Leavenworth Colby, member of the Advisory Committee on Admiralty Rules; Warren Olney III, Director of the Administrative Office of the United States Courts; Will Shafroth, Deputy Director of the Administrative Office; and Aubrey Gasque, Assistant Director of that Office, who serves as Secretary of the standing Committee on Rules of Practice and Procedure and the Advisory Committees.

The Chairman's staff, consisting of Mr. James R. Phippard, research assistant, Mrs. Helen Benham, secretary, and Mr. John D. Hawke, Jr., law clerk, also attended.

Agenda 1. Discussion of plans presently under way for the preparation of rules relating to appeals from the District Courts in civil cases and in criminal cases.

Upon calling the meeting to order, the Chairman stated as the objective of the Committee the formulation of what might be termed a uniform set of appellate rules, and outlined the plan for initial procedure of the Committee's work. The work of the Committee began by collecting all appellate rules of state and federal courts and also courts of similar jurisdictions, such as Great Britain, Canada, etc. At this point Mr. Phippard entered on duty and began preparation of a check list of all elements, even to minute details, contained in a theoretically complete set of appellate rules, and his check list is nearing completion. He then will go through the rules of the eleven federal Courts of Appeals and the rules of the state appellate courts. When this work is completed, a comparative study of all existing sets of appellate rules, in detail, will be available for study by the Committee members.

A motion was made and seconded that a Reporter be appointed with all deliberate speed, and the Committee voted unanimously in favor of the motion.

Judge Maris called attention to the fact that, although Congress has passed enabling statutes by which the Supreme Court has promulgated the rules under consideration by other Committees, and a rule relating to appeals in tax cases, no such enabling statute has been passed respecting appellate court rules. The Committee discussed the question whether Congress should be requested immediately to enact enabling legislation relative to appellate rules, or whether the Committee should proceed with the preparation of suggested rules and thereafter consider the problem of enabling legislation. After extended debate, a motion that it be the sense of the Committee that enabling legislation be promptly requested failed to carry.

Upon motion it was unanimously agreed that the studies of the Committee would include the entire appellate process and should be made in complete liaison with the other Advisory Committees

Upon the suggestion of the Chairman, Judge Maris outlined the procedure whereby members of the Committee shall serve for either two or four years, all terms to begin as of October 1, 1960. In accordance with the suggestion, lots were drawn, and the following terms were allotted:

Robert Ash	4 years
Stanley N. Barnes	2 years
Henry J. Friendly	2 years
Willard W. Gatchell	2 years
William J. Jameson	4 years
Shackelford Miller, Jr.	4 years
J. Edgar Murdock	4 years
Joseph O'Meara	2 years
Richard T. Rives	4 years
Samuel D. Slade	4 years
Simon E. Sobeloff	2 years
Robert L. Stern	2 years

Agenda 2. Consideration of Committee procedure in respect of matters in which statutory provisions are now in effect.

The Chairman asked the opinion of the Committee with respect to the conduct of the study of topics that are covered by existing statutes which the Committee feels should be changed -- whether the Committee should recommend changes or skip those points and adopt the provision of the statute. Upon motion by Judge Sobeloff the Committee unanimously voted that it study all existing statutes affecting appeals and recommend changes where such changes seem advisable.

Agenda 3. Discussion of the proposed draft of rule in tax cases.

The Chairman called upon Judge Clark, who directed

the attention of the Committee to the proposed draft which he suggested in place of the tax rule prepared by the Committee. He stated that the present system now in effect, as contained in Rules 73 through 76 of the Civil Rules, should not be changed until thorough study has been made by all of the Committees. He also said he did not think major rules should contain house-keeping details such as those contained in the draft proposed by the Appellate Rules Committee.

The Chairman stated that the reason the Committee had proceeded without delay to draft the proposed tax rule was because Congress had passed the statute in 1957 authorizing the Supreme Court to promulgate rules for appeals in tax cases; and that he was under the impression that there was some urgency that this be accomplished as soon as possible.

The Chief Justice, who was present during this discussion, advised that, inasmuch as the Committee has begun and made progress with consideration of this rule, he believed there was no further crisis in respect to the matter and that it could be handled in the ordinary course of business, although he assumed the Committee would think it best to perform this part of its task expeditiously.

Judge Prettyman expressed disagreement with Judge Clark's basic philosophy as to rules of procedure. After further extended discussion, upon motion it was voted that the Chair appoint a subcommittee and that it is the sense of the meeting that the subcommittee be instructed that they go further than adopt a simple one-sentence rule incorporating provisions in the Civil Rules.

Agenda 4. Consideration of a plan for formulating rules in admiralty cases.

Judge Barnes, who with Judge Friendly had been appointed by the Chairman to consider a plan for the preparation of rules governing appeals in admiralty cases, reported that he talked with Judge Pope, Chairman of the Admiralty Rules Committee. Judge Pope urged that nothing be done in this field until after his Committee meets on February 20th.

Upon motion the Committee voted to advise the Committee on Admiralty Rules that its view is that appeals in admiralty cases and whatever is decided in respect to appeals in civil actions should be assimilated, and that this Committee convey to that Committee the hope that a liaison machinery might be set up to insure coordination between the two Committees.

Agenda 5. Consideration of a plan for formulating appellate rules in bankruptcy cases.

The Committee voted that this matter be referred to the Reporter for study.

Agenda 7. Discussion of a plan for formulating rules for appeals from administrative agencies.

Mr. Gatchell and Mr. Stern had been asked to consider this problem, and after some discussion it was voted that this question be referred to the Reporter for study and report. It was further voted that present methods of procedure for review of administrative agency cases by three-judge courts, under the Expediting Act, etc., be added as matters to be studied by the Reporter. All members of the Committee are encouraged to contact agencies and the practicing bar before the administrative agencies for suggestions on appellate procedure.

Agenda 8. An extended discussion of peculiar problems relating to appeals in forma pauperis was had. A special admonition to the Reporter was suggested that he confer at length with Professor Barrett, Reporter for the Criminal Rules Committee.

Agenda 9. There was a short discussion of special problems in cases in which appeals are filed in two or more

circuits, but no action was taken by the Committee.

Agenda 12. The Advisory Committee on Civil Rules requested this Committee to consider the "clearly erroneous" rule in Civil Rule 52(a). After a short discussion the Chairman was directed to invite the Reporter for the Civil Rules Committee to attend the next meeting of this Committee and to furnish the members with copies of his memorandum on the subject.

Agenda 10. Upon the suggestion of Mr. Ash, a special question arising from the fact that Courts of Appeals sometimes stay a mandate for a period less than ninety days, thereby imposing a practical restriction on the statutory time of ninety days for filing petitions for writs of certiorari, was placed on the agenda for the next meeting.

On Tuesday, January 31st, the Committee on Appellate Rules held a joint meeting with the Clerks of the eleven Courts of Appeals and Mr. Browning, Clerk of the Supreme Court, who, as Chairman of the Clerks' meeting, acted as co-Chairman of this meeting. Mr. Browning advised the Committee that the Clerks had met the previous day and discussed what every Court of Appeals Clerk is doing on each of the subjects of procedure that occupy their business hours; that the proceedings are being

transcribed; and that a complete statement will be prepared on the meeting. Mr. Browning then called upon each of the Clerks to discuss the following subjects, and as each subject was presented the members of the Committee also discussed it with the Clerks: (1) possible ways and means of reducing the costs of appeals; (2) in forma pauperis cases; (3) appeals involving motions under 28 U.S.C. § 2255; (4) the printing of records; and (5) the handling of records when appeals are filed in two or more circuits.

At the conclusion of the joint meeting the Committee further discussed the printing of records. The Chairman was authorized to appoint a subcommittee to inquiry into available methods of reproduction which might be substitutes for printing.

After discussion, the date of the next meeting of the Committee was tentatively set to coincide with the meeting of the American Law Institute in Washington, D. C. (May 17-20, 1961).

---ooOoo---

Subsequent to the foregoing meeting the Chairman notified the members that the next meeting of the Committee is called for Monday and Tuesday, May 22nd and 23rd.

Pursuant to authorization by the Committee, the
Chairman has appointed the following subcommittees:

On Revision of the Draft of Rule in Tax Cases --

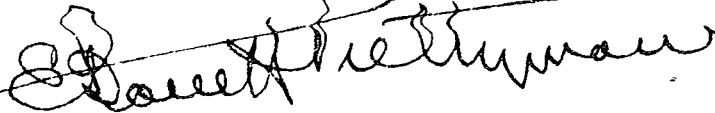
Mr. Stern
Mr. Ash
Judge Murdock
The Chairman of the Committee

On Methods for the Reproduction of Records --

Mr. Slade

The Chief Justice has been informed of the action of
the Committee in respect to the appointment of a Reporter.

FOR THE COMMITTEE:

A handwritten signature in cursive script, reading "E. Barrett Prettyman". The signature is written in dark ink and is positioned above a horizontal line.

E. Barrett Prettyman, Chairman