MINUTES OF THE MAY MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES

The eighth meeting of the Advisory Committee on Appellate Rules convened in the Supreme Court Building on May 18, 1965, at 9:30 a.m. The following members were present:

E. Barrett Prettyman, Chairman
Robert Ash
Stanley N. Barnes
Henry J. Friendly
Willard W. Gatchell
William J. Jameson
Shackelford Miller, Jr.
Joseph O'Meara
Arnold Raum
Richard T. Rives
Samuel D. Slade
Simon E. Sobeloff
Robert L. Stern
Bernard J. Ward, Reporter

Judge Raum was unable to attend the second day of the meeting.

Others attending the meeting for all or part of the sessions were: Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professors James William Moore and Charles Alan Wright, members of the standing Committee; John F. Davis, Clerk of the Supreme Court of the United States; Edmund P. Cullinan, Chief Deputy Clerk of the Supreme Court of the United States; William E. Foley, Deputy Director of the Administrative Office of the United States

Courts; Will Shafroth, Secretary to the Rules Committees; and Joseph F. Spaniol, Jr., Attorney, Administrative Office.

The Chairman called the meeting to order and stated that the Reporter would make his recommendation for each rule in light of the suggestions and comments received from the bench and bar and then each rule would be open for discussion and action.

RULE 3. APPEAL AS OF RIGHT -- HOW TAKEN
(a) Filing the Notice of Appeal

The Reporter stated the Committee had tried to include in the proposed rule provisions which would persuade the courts of appeals to treat the "good faith" attempt to appeal as an appeal itself. The Committee at its last meeting asked the Reporter to draw up a Note citing the recent liberal decisions in lieu of the present Note. The Reporter presented a revised draft of a general Note, but stated that so much of the rule itself, particularly lines 11-20 of subdivision (a) in the Preliminary Draft, suggests generous handling. Therefore, the Reporter suggested that lines 11-20 be eliminated but that the rest of the rule remain as stated, referring the reader to the general Note which makes the same point and cites specific cases. The Committee, upon motion of Judge Barnes, approved deletion of lines 11-20, and approval of the general Note.

It was suggested that the language in lines 4-5 be changed to state that the notice of appeal should be filed with the clerk of the district court. Professor Moore did not think this wise and thought the rule should remain liberal to take care of the few people who would find it necessary to file with the judge. Mr. Slade concurred with Professor Moore. Judge Barnes, however, thought the language should be changed to specifically tell the lawyers with whom the notice should be filed. Mr. Slade moved that the language remain as presently stated in lines 4-5 of the Preliminary Draft. The motion was seconded and carried by a vote of 7 in favor of the motion and 4 opposing it.

Rule 3(b) Appeals in Proceedings in Bankruptcy and Controversies Arising in Proceedings in Bankruptcy

The Federal Bar Association and the Department of Justice made suggestions for a provision for consolidation of appeals. After discussion of the suggestions, Judge Barnes moved that the language be modified by the addition of a provision to consolidate cases along the lines suggested by the Federal Bar Association as follows:

> (b) JOINT APPEALS. If two or more persons are entitled to appeal from a judgment or order of the district court and their interests are such as to make joinder practicable, they may thereafter proceed on appeal as a single appellant.

> Appeals may be consolidated by stipulation of all parties filed with the clerk of the court of appeals or by order of the court of appeals upon its own motion or upon motion of a party.

The motion was seconded and carried.

Rule 3(d) Appeals in Criminal Cases

The Reporter recommended elimination of the provision requiring that the notice of appeal be sent to the court of appeals in all cases. Upon motion of Mr. Slade, the Committee approved deletion of the phrase "and shall mail a copy of the notice of appeal to the clerk of the court of appeals" in lines 47-49 of the Draft with the restriction that a copy of the notice be sent to the clerk of the court of appeals in criminal cases, habeas cases, §2255 cases, and in those cases sent on the docket entries.

Judge Barnes suggested that the words "defendant-appellant" in line 52 were confusing as the government sometimes appeals. The Reporter suggested that the word "appellant" be stricken and leave the word "defendant." The Committee approved the Reporter's suggestion.

RULE 4. TIME FOR FILING THE NOTICE OF APPEAL
(a) Appeals in Civil Cases Generally

The Committee had previously recommended that the rule in civil cases with respect to the power of a district judge to extend time of appeal be changed. The rule presently in effect

says that the time of appeal can be extended upon a showing of excusable neglect, based upon failure to learn in the entry of judgment, whereas the criminal rule has no authority to extend the time. The Committee, in the Preliminary Draft, recommended that in both civil and criminal cases a district judge be empowered to extend the time for 30 days for any reason of such excusable neglect. The effect is to give new power to the district judge in criminal cases and to extend his power in civil cases. The proposal as to civil cases has been criticized by the Federal Bar Association and the Tenth Circuit Committee.

The Reporter recommended that the provision with respect to extending time in civil cases be dropped and that it be retained in criminal cases; i.e. that the Committee retain the language in the present Rule 73(a) that the time of appeal may be extended upon a showing of excusable neglect, based upon failure to learn in entry of judgment, and that in criminal cases it remain as shown in the Preliminary Draft.

Judge Friendly, at the last meeting, made a suggestion to the Committee that consideration be given to the problem of the effect on the running of the time of appeal of a motion to reconsider -- one of the motions under Civil Rule 73(a). The Reporter was instructed to consult with Professor Kaplan,

Reporter of the Civil Rules Committee, concerning this matter. Professor Kaplan felt that Civil Rule 73(a) (Appellate Rule 4(a)) might be amended to read as follows:

> A motion for reconsideration of the disposition made of one of the motions listed above shall not again terminate the running of the time for appeal.

After lengthy discussion, Judge Rives moved adoption of Professor Ward's recommendation to retain the present civil rule which limits the excusable neglect showing to failure to learn in the entry of judgment, and to keep the proposed rule with respect to criminal appeals as stated in subdivision (d) of the Preliminary Draft. The motion carried by a vote of 7 in favor of the motion to 4 against it.

Judge Friendly suggested that the Reporter's recommendation be carried out and that nothing further be inserted in the rule to comply with Professor Kaplan's recommendation. Upon motion duly made, the Committee approved Judge Friendly's suggestion.

Professor Moore stated that insofar as rulemaking was concerned, he thought it best to leave the rules alone and let the atypical cases work themselves out through the judicial process used in the past. If expansion is desired, it should be done in the Advisory Committee's Notes.

Mr. Stern suggested that the proposal of the Federal Bar Association to eliminate subdivision (b) of Rule 4 and merge it with subdivision (a) be taken up with the Advisory Committee on Bankruptcy Rules and that, if that Committee has no objection, this be done. The motion was duly made and approved.

Judge Friendly moved that a provision be added to Rule 4(a) that appeals from orders of remand be taken within 10 days. The motion was seconded and carried. Professor Moore suggested that a reference be made to the statutes to make it clear that this rule applies only to appeals under the statute.

Professor Ward presented the following draft of Rule 73(a) which had been approved by the Civil Rules Committee at its meeting on May 14, 1965, with the recommendation that it be adopted by the Appellate Rules Committee:

> The running of the time for appeal is terminated by a timely motion entertained or held timely by the district court made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon such a motion under these rules.

Judge Friendly, as well as the Reporter and other members, thought the proposed rule had dangerous implications, and after discussion, the Committee decided not to adopt the recommendation of the Civil Rules Committee.

On the second day of the meeting Professor Charles Wright, member of the standing Committee, attended the session and presented the views of the Civil Rules Committee with regard to Rule 4(a). He stated that if the Civil Rules Committee had known that the Appellate Rules Committee would have disapproved their recommendation for Rule 4(a), it seems highly probable that the Committee would have acted on a matter within their jurisdiction for making motions for new trials and would have recommended to the standing Committee that the motions for new trials in all cases may be extended by the judge.

After lengthy discussion of this matter, Judge Friendly moved that the following terminology be adopted for line 18 of subdivision (a):

> by a timely motion or one held timely by the district court ....

The motion was carried by a vote of 5 approving and 4 against it. Judge Friendly stated that even though he had recommended adoption of this, he still preferred the terminology of the Preliminary Draft.

Professor Ward stated that he had rewritten the Note because a comment had been made that the rule is clear but the Note suggests that added time might be restricted to the technical cross-appeal situation. The purpose of rewriting the Note was to make it clear that the added time is given to any party.

Judge Friendly called attention to the amended provision concerning the "showing of excusable neglect" and stated that the amendment did not say whether or not this should be on motion. He inquired whether it was intended to be as vague as it was stated. The Reporter stated that at the last meeting the Committee voted to authorize the district court to extend the time before or after the time had expired, with or without motion or notice. He further stated that perhaps the Note should make reference to this. The Committee decided this was a matter for the Subcommittee on Detail.

Rule 4(c) Appeals by Permission or Allowance; Appeals Under 45 U.S.C. §159.

Professor Moore felt that in subdivision (c) it would be best not to spell out or enumerate precise sections of the Bankruptcy Act, but to change the sentence to read as follows:

> The filing of a notice of appeal is not required when permission of appeal is granted under §1292(b) or under the Bankruptcy Act.

The Committee referred this suggestion to the Subcommittee on Detail.

Rule 5. APPEALS BY PERMISSION UNDER 28 U.S.C. §1292(b)
(c) Grant of Permission; Cost Bond; Filing of Record

A comment had been received that a provision be added to this subdivision requiring the entry of a cost bond to be filed in 10 days in the entry of the order granting permission to appeal. The Reporter stated this was noncontroversial and recommended that this be done. The matter was referred to the Subcommittee on Detail.

RULE 8. STAY OF JUDGMENT OR ORDER OF THE DISTRICT COURT PENDING APPEAL.

(a) Stay Must Ordinarily be Sought in District Court; Motion for Stay in Court of Appeals.

The Federal Bar Association and the Department of Justice recommended that procedure on stays be spelled out more specifically and especially concerning the circumstances under which a single judge can grant a stay and the circumstances concerning the action by the court. The Federal Bar suggested a paragraph to amend this subdivision, but the Reporter did not think it appropriate and recommended that the suggestion of the Department of Justice be adopted which would add a single sentence immediately prior to the last sentence of this subdivision and to read as follows:

> The application shall be filed with the clerk and normally will be considered by a panel of the court, but in exceptional cases where such procedure would be impracticable or impossible due to the requirements of time, the application may be made to and considered by a single judge of the court.

Mr. Slade questioned two phrases of the sentence: "normally will be considered by a panel of the court," and "the application may be made to and considered by a single judge of the court." He felt the first phrase was an admonition of the court, and that the second phrase was not clear as to who would decide the issue. Judge Friendly felt the present rule would be better. Judge Maris, however, thought it should be a matter of policy of the internal work of the court.

Judge Barnes moved that a sentence to conform in substance to the one suggested by the Department of Justice be added to the rule. The motion was carried unanimously.

Professor Moore inquired whether there should be some sort of short automatic stay in the remand orders as it is a troublesome area. He felt that many people are moving cases under that section which should not be and that some provision should be made for the person legitimately removing and the district court remands. The Committee asked the Reporter to study this matter.

RULE 9. BAIL

The Reporter recommended the reference to the phrase "from a judgment of conviction" in lines 4 and 32 be stricken. He stated that Professor Barrett was in accord with this suggestion. The matter was referred to the Subcommittee on Detail.

RULE 10. THE RECORD ON APPEAL
(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered

The Department of Justice and the Federal Bar Association suggested that a provision be included in this subdivision advising the party who argues insufficiency of evidence on appeal to order a transcript of all relevant evidence. The Committee, after full discussion, adopted a provision to conform in substance to the following paragraph recommended by the Department of Justice:

> (b) The Transcript of Proceedings; Duty of Appellant to Order: Notice to Appellee if Partial Transcript is Ordered.
>
> Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends

to include in the record and a statement of the issues which he intends to present on the appeal. If the appellant intends to urge on appeal that a certain finding or conclusion is unsupported by evidence or contrary to the evidence, he shall include in the record a transcript of all the evidence pertinent and relevant to the particular finding or conclusion he intends to challenge. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after service on him of the appellant's description and statement pursuant to the preceding sentence, order such parts from the reporter or apply for an order from the district court requiring the appellant to so do. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

RULE 10(f) (Proposed)

The Federal Bar Association suggested that a new subdivision (f) be added to this rule to be entitled Forwarding of Corollary Records. Judge Barnes said it is becoming necessary to obtain this information, but after discussion of the matter, the Committee decided not to add a new subdivision for this.

RULE 11. TRANSMISSION OF THE RECORD

(a) Time for Transmission; Duty of Appellant

The Reporter stated that many suggestions had been received to eliminate the word "promptly" in line 8 of this subdivision. The general consensus was that it should be 10 days. The matter was referred to the Subcommittee on Detail.

Rule 11(b) Duty of Clerk to Transmit the Record

Inasmuch as this rule was discussed after Rule 28, Judge Maris stated that with the approval of the designated excerpts to be bound in one copy, which would require pagination, he thought the only circuit which would find pagination helpful would be the Ninth Circuit. Professor Ward stated that it would also be used in forma pauperis cases, and that perhaps pagination could be required but exemption allowed for the documents involved.

After prolonged discussion of this matter, the Committee, upon motion of Judge Barnes, approved pagination on this so that the attorney will know pagination is required no matter which method he uses. It was noted that this would not include the transcript.

Rule 11(d) Retention of the Record in the District Court by Order of Court

The matter of certification of the record was discussed and the Committee adopted the Reporter's suggestion that the appellant

be allowed to certify that the record is ready to go up rather than have the clerk of the court file a certificate.

Rule 11(c) Extension of Time for Transmission of the Record; Reduction of Time.

The Reporter recommended adoption of the suggestions of the Department of Justice and the Federal Bar to have subdivision (c) apply to criminal cases as well as civil cases. The Committee, upon motion duly made, approved deletion of the phrase "in civil cases" in line 47 of this subdivision.

Judge Raum called attention to the suggestion of the Federal Bar that the words "on motion" be inserted after the words "district court may" in line 46 of this subdivision. Judge Raum stated that he disfavored this and hoped the Reporter would not incorporate this suggestion. The Reporter, also, was not in favor of this, and Judge Raum moved that the Committee not follow the suggestion of the Federal Bar for this rule. The Committee approved the motion, but stated there was no objection to using "for cause shown" as further recommended by the Federal Bar.

RULE 12. DOCKETING THE APPEAL: FILING OF THE RECORD

(a) Docketing the Appeal

The Reporter stated that the Preliminary Draft provided that when the clerk dockets the appeal it is given the name it had in the district court, with such addition as to indicate the identity of the appellant. The Department of Justice did

not agree with this as it thought the appellant should be named first and the appellee second. The Federal Bar approved the draft but called attention to the problems raised by in rem proceedings and land condemnation cases.

Upon motion of Mr. Stern, the Committee approved the subdivision in the Preliminary Draft for normal cases but requested the Reporter to draft an additional provision to take care of the special cases in bankruptcy, receivership, and in rem.

The Reporter recommended that the Committee insert a provision to deal with the extension of time for docketing. The Committee, upon motion duly made, approved the recommendation.

Rule 12(c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal

The Justice Department questioned the legality of the last sentence of this subdivision. The Reporter stated he thought it was archaic and recommended the deletion of lines 45-50. The Committee approved the recommendation.

RULE 13. REVIEW OF DECISIONS OF THE TAX COURT

(a) How Obtained; Time for Filing Notice of Appeal

The Federal Bar Association suggested that the second paragraph of the subdivision about the running of the time of appeal include a provision which would incorporate a decision of the recent Eighth Circuit case that the running of the time is terminated by a timely motion to amend or make additional

findings of fact. The Reporter felt the suggestion should be adopted but that the wording should conform to that of the Civil Rules. He recommended that a provision be added to lines 13-16 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required as the motion is granted. The matter was not acted upon due to the lack of a formal motion.

RULE 15. REVIEW OF ENFORCEMENT OF AGENCY ORDERS - HOW OBTAINED; INTERVENTION

(c) Service of Petition or Application

The Federal Bar Association and the Department of Justice suggested that consideration be given to the services to petition or application. They felt the rule is good but that it requires service be made on all participants below. They hoped the rule would restrict service in those cases to parties who did something more than write a letter to the agency concerned. The Reporter preferred the Department of Justice's suggestion but recommended that it be limited to the agency cases and review of orders and rule-making procedures. After discussion, Judge Barnes moved that subdivision (c) be left as printed in the Preliminary Draft. The motion carried.

The Federal Bar also suggested that the provision on stays in Rule 8(c) be inserted in Rule 15. It was suggested that this might be inserted under General Provisions. The matter was referred to the Subcommittee on Detail.

RULE 23. APPEALS IN FORMA PAUPERIS - GENERAL PROVISIONS

(a) Application for Leave to Proceed on Appeal in Forma Pauperis

The Committee, at its November meeting, decided to include a provision stating that if the party had been allowed to proceed in forma pauperis, he may appeal in the same manner without applying for leave to do so, subject to the right of his adversary to object and the Reporter was asked to draft a revision of this section. The redraft, as stated below, will be subdivision (a), and the present subdivision (a) will become subdivision (b), etc.

> (a) Application for Leave to Proceed in Forma Pauperis Not Required in Certain Cases.
>
> If a party has been permitted to proceed in forma pauperis in the proceeding in the district court, or has been permitted to proceed there as one who is financially unable to obtain an adequate defense in a criminal case, he may file a notice of appeal and otherwise proceed on appeal without further authorization. If, before or after an appeal is taken, upon objection of a party or upon its own motion, the district court shall find that the party is not entitled so to proceed on appeal, it may enter an order to that effect, with a statement of the reasons for its decision. Thereafter, the party may file the affidavit required by subdivision (b) with the clerk of the court of appeals and otherwise proceed in accordance with the provisions of subdivision (c).

Judge Rives moved that the Reporter's draft be accepted. The motion was seconded and carried, one vote being case in opposition.

Judge Friendly felt the revised language is ambiguous and moved that, in some appropriate way, the language be changed to make it clear that the second sentence empowers the district court to enter a timely certificate, as it was able to do in the past, and which the statute says it shall enter - not limited to a finding of a lack of poverty.

After discussion, it was decided that the revised paragraph be rewritten and that there be at the end of the first sentence a proviso incorporating the language of the statute suggested by Judge Friendly and Mr. Slade to incorporate the phrase "unless the trial court certifies in writing that it is not taken in good faith." It was further suggested that a clause be incorporated to protect the right to show that the party has sufficient funds and the anwering affidavit.

After further discussion, Judge Miller moved that the Reporter prepare another draft of paragraph (a) along the lines suggested. The motion was carried.

RULE 24. APPEALS IN FORMA PAUPERIS IN CRIMINAL CASES

A suggestion was made by the Reporter that Rule 24 be stricken and that Rule 23 cover the entire subject of pauperis appeals. The Committee approved the suggestion as the most practical solution.

RULE 25. FILING AND SERVICE

(a) Filing

The Reporter stated there had been a number of suggestions on this rule, the most important being a suggestion that the word "filing" be defined to make the time of mailing the time of filing. Judge Barnes suggested that the language of the Federal Bar be considered for subdivision (a). The Bar's suggestion was considered but not adopted.

Mr. Stern moved that the theory of filing by mail be adopted as as optional method. The motion was seconded but lost by a vote of 2 in favor and 7 opposing. The provision remains that filing is only timely if papers are recieved within the time fixed for filing.

Judge Barnes moved that a variation of this be adopted and that the Reporter be authorized to redraft an additional subdivision to Rule 25 to cover those circuits outside the United States. The motion was seconded and carried by a vote of 8 for approval to 2 against it.

RULE 26. COMPUTATION AND EXTENSION OF TIME
RULE 27. MOTIONS

Rule 26(b)

The Reporter stated that there had been a number of suggestions on this rule, mostly representing the old laws which had been debated by the Committee on several occasions.

The majority of the comments had suggested a provision to prevent courts of appeals from deciding motions except following opportunity to be heard. This was one of the provisions which the Committee had previously decided not to include in the rule. The Reporter stated that the proposed rule is a variation of Civil Rule 6(b) to require a showing of good cause for an extension. The Civil Rule does not require a motion in this area as long as the extension is asked for in advance of the expiration time the motion practice is not necessary - it may be ex parte. After expiration, a motion must be obtained. The Appellate rule does not follow this as the Committee felt the party should be heard and at least require motion in every case even if the motion could be decided ex parte. The Department of Justice wants the Appellate Rule to revert back to the Civil Rule.

Mr. Gatchell suggested that the number of days in line 12 be changed. This was referred to the Subcommittee on Detail.

Rule 27

The principal complaint about Rule 27 is whether there should be an ex parte motion as procedural orders should not be decided ex parte. The Reporter recommended that the Committee consider a compromise, which was once discussed, but rejected, to retain such part of the rule that allows ex parte motions subject to the right of any party seeking consideration within 10 days thereafter.

The Reporter stated there has also been criticism because the period of 7 days for motions to dismiss is too brief. It was suggested that 14 days be allowed. The matter was referred to the Subcommittee on Detail.

After discussion, the Committee approved a motion duly made that the Reporter review Rule 26, specifically on extensions of time, and Rule 27, relating to motions general, so that they will indicate that motions for procedural orders and motions for extensions may be determined without notice or hearing, provided that the opposing party be authorized to petition for reconsideration within the specified number of days.

RULE 28. BRIEFS
Rule 30. THE APPENDIX TO THE BRIEFS

Discussion was held on the matter of briefs and the method used in the Ninth Circuit was reviewed. Judge Barnes stated this method had been used for approximately 4 years and had been found very successful.

Judge Prettyman stated that he would like to see the words "joint appendix" removed from the rule and the term "designated excerpts" or a similar term substituted therefor.

After lengthy discussion of the matter, Dean O'Meara presented a plan for the preparation of the briefs as follows:

He stated there are three distinct aspects of the problem, the first being what the parties should present to the judge to read. He felt that the lawyers act irrelevantly and many repetitious questions appear. This was the genesis of the appendix which was converted into a joint appendix and which he hoped would be kept under another name. He hoped the Committee would not present to the bar of the country a set of rules which would cause the judges to go from one document to another in order to read the record. He thought the first issue to be decided by the Committee is whether the Committee wants to make it as clear as possible that what is needed is the essentials of the record, presented as coherently as possible in a single document.

The second issue to decide is when the single document containing the essentials of the record should be presented.

The third issue to decide is the number of copies of the essentials of the record which are necessary. He felt this was not something the judge needs - the single document setting out in coherent form the essentials of the record - but it is for the convenience of counsel to agree so that it would be left to agreement between counsel whether they want the deferred statement of the essentials of the record. Dean O'Meara thought the circuits should be able to make their own decisions on the number of copies of the essentials of the record. He also stated there may be a subsidiary question - the matter of reproduction.

Judge Maris said he agreed with Dean O'Meara on his suggestions but thought that all of this should be considered in the light of the two phases of criteria or objectives: (1) to provide the judges of the panel with a convenient tool to use in considering decisive cases, and (2) the expense, time, trouble, etc. imposed upon parties and their counsel.

Judge Prettyman thought the four objectives of Dean O'Meara's plan should be discussed individually and presented each one to the Committee.

Question 1: What shall the lawyers present to the court?

Motion: Mr. Stern moved that the Committee adopt the proposed rule which in effect says that the lawyers shall present to the court the essentials from the record coherent in one document; to include the items listed as 1, 2, 3, and 4 of subdivision (a) of Rule 30; and that it should also include the following paragraph:

> (e) Appeals on Original Record Without Appendix.
>
> A court of appeals may by rule or order dispense with the requirement of an excerpt of the record and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

Mr. Stern's motion was seconded and carried.

Question 2: When should it be presented?

Motion: Upon motion duly made, the Committee directed that the rule should express the requirement that this material be presented at the time the appellant's brief is presented except that there be an option to counsel to defer the presentation until all briefs have been filed and that the court has the power to order this be done. It further stated that the Note should explain that the deferred method is particularly applicable to long cases.

Question 3: How many copies of this material should be filed?

Motion: Mr. Slade moved that the rule require filing of 10 copies of the excerpt from the record unless the court, by rule or order, shall direct a lesser number. The motion was approved.

It was further decided that the rule require the appellant to serve on each other party one copy of the designated excerpts.

Question 4: What will the manner of reproduction be?

Motion: Judge Miller moved that the method of reproduction remain as presently stated in Rule 32, lines 2 and 3, of the Preliminary Draft. The motion was carried.

It was also decided that the word "black" be retained in line 5 as the color of print.

Judge Barnes moved that lines 27-31 of subdivision (a), Rule 32, be made as a recommendation of the Committee rather than mandatory that the color of briefs be specified. The motion was carried.

The Federal Bar Association made the suggestion that where there is more than one appellant the appellee may file the same brief and that the same brief for all appellants may be filed when there is more than one appellant. The Reporter recommended this be done and the language be changed to conform. The recommendation was adopted by the Committee.

RULE 29 - BRIEF OF AN AMICUS CURIAE

The Committee approved the provision that the rule be revised to include that the United States by the Attorney General or a State by its Attorney General can file a brief amicus automatically without permission.

Mr. Stern made two suggestions which were referred to the Subcommittee on Detail as follows: (1) that the brief of an amicus may be filed by leave of court or at request of the court,and (2) when an amicus should have to file the brief.

RULE 31 - FILING AND SERVICE OF BRIEFS AND THE APPENDIX

The main issue to be decided was the question of time for filing briefs. The Committee approved Judge Maris' recommendation that there be 10 days for the appellant's designation, 10 days thereafter for the appellee's designation, and 40 days after original docketing for the appellant's brief.

The Committee, upon motion duly made, approved deletion of the word "three" in line 20 of subdivision (c) and insertion of the word "two" therefor.

RULE 34. ORAL ARGUMENT

Mr. Gatchell said he had received several verbal suggestions concerning the 30 minute rule for oral argument, which is considered insufficient time. The matter was discussed fully and the members felt that the time limit is sufficient and that if additional time is needed and requested in advance, it is usually granted. Judge Friendly suggested that the Subcommittee on Detail review this rule so it would provide that any request made reasonably in advance would be granted and that a motion is not required to do so. The matter was referred to the Subcommittee on Detail.

RULE 35. DETERMINATION OF CAUSES BY THE COURT IN BANC

The Reporter recommended a change to allow any judge who sits to open the question of whether the matter should be disposed of in banc. The proposed rule does not permit a visiting or senior judge to do this. Mr. Stern moved that the sentence beginning with line 12 through line 14 of this rule be deleted. The motion was carried.

Judge Friendly, however, thought that the revised rule with the deletion of lines 12-14 was unclear. He thought it would indicate that an in banc should go to the other judges to worry about when the panel may entertain a petition for rehearing on its own. The Subcommittee on Detail was asked to consider the matter.

RULE 39. COSTS

The Reporter was asked to prepare a draft to take care of the possibility of a mandate going down before costs are determined, whether the cost is sent down immediately in an unusual case, or in situations where quarrels as to costs would delay issuance of the mandate. The question raised was whether the rule could provide for a supplemental mandate. The Reporter felt the rule could be rewritten to say if the mandate had been issued before final determination, the statement of costs shall be inserted in the mandate upon request of the court of appeals. The Reporter suggested the following paragraphs:

> (c) Costs of Briefs and Appendices. The cost of printing or otherwise producing briefs and appendices shall be taxable in the court of appeals at rates not higher than those generally charged for such work. A party who desires such costs to be taxed shall state them in a verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill may be filed within 7 days after service.
>
> (d) Statement of Costs to be Inserted in Mandate. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate. If the mandate has

been issued before final determination of costs, the statement, or any amendment thereof, shall be inserted in the mandate upon the request of the clerk of the court of appeals.

Mr. Stern moved the Reporter's suggestion be adopted. The Committee so approved.

RULE 49. SUPREME COURT - CUSTODY OF PRISONERS

The Reporter stated that the Appellate Rule 22 was drafted according to the Supreme Court Rule and that comments had been received from Professors Reitz and Amsterdam that the first paragraph of the Supreme Court Rule was being interpreted in some of the civil rights cases as holding authority from any court to release the prisoner on bail if the application for writ was summarily denied. The Supreme Court had asked the Appellate Rules Committee to review their rule and to make a recommendation.

The Reporter presented a draft and recommended that paragraphs (1) and (2) be combined into a single paragraph as follows:

> (1) Pending review of a decision failing or refusing to release a prisoner in a habeas corpus proceeding, the initial custody of the prisoner shall not be disturbed except by order of the court in which the proceeding is pending, or a judge or justice thereof. Pursuant to such an order, the prisoner may be

> detained in any appropriate custody, or may be enlarged upon recognizance with surety. A person having custody of the prisoner may obtain an order for his removal upon a showing that custodial considerations require removal, but the order shall make appropriate provisions for substitution of the successor custodian. Any person who shall become custodian of the prisoner pending review may be added as a respondent at any time. Process and any writ or order may be served upon such person wherever he may be found.

Mr. Slade questioned the sentence reading "Pursuant to such an order the prisoner may be detained in any appropriate custody, or may be enlarged upon recognizance with surety," as to whether this meant the prisoner would not be released without bail. Judge Sobeloff stated the tendence in the federal and state systems is to take a more relaxed attitude towards bail. He stated this is especially true when dealing with people who have not been tried, although in this instance it is dealing with people who have been tried. He felt, however, that the judges of the appellate courts could be trusted not to give bail unless clearly justified. Judge Sobeloff moved that the sentence be changed to read:

> Pursuant to such an order, the prisoner may be detained in any appropriate custody, or may

be enlarged upon recognizance with or without surety.

The motion was seconded and carried.

At the suggestion of the Reporter, the Committee approved the following wording to be added to the introductory clause of the first paragraph:

Pending review of a decision of a court, justice or judge of the United States refusing a writ of habeas corpus . . . .

Upon motion duly made, the Committee adopted paragraph (1) as amended.

The Reporter recommended the following draft for paragraph (2) in lieu of presently numbered paragraph 3:

(2) Pending review of a decision releasing a prisoner on habeas corpus, he shall be enlarged upon recognizance, with or without surety.

Upon motion of Judge Barnes, the Committee approved paragraph (2) with the deletion of the word "shall" and the insertion of the word "may." It was further suggested that the first two paragraphs be combined and the matter was referred to the Subcommittee on Detail.

The Reporter recommended the following wording for paragraph (3) in lieu of presently numbered paragraph 4:

An initial order respecting the custody or enlargement of the prisoner pending review,

> and any recognizance or surety taken, shall cover review in the court of appeals and further possible review in this court; and only where special reasons therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any independent order made in that regard.

Professor Wright brought up the point that in a case where the court of appeals thinks a man is entitled to habeas corpus, the present paragraph (3) requires that he be released but that the present draft takes this away. Professor Wright thought the "except clause' would have to be left in. This paragraph was referred to the Committee on Detail for clarification.

The Reporter recommended that the following wording be adopted for paragraph (4) in lieu of paragraph (5):

> For the purpose of this rule, a case is pending in the court possessed of the record until a notice of appeal or a petition for a writ of certiorari has been filed, or until the time for such filing has expired, whichever is earlier; and is pending on review in the appellate court after the notice of appeal or the petition for writ of certiorari has been filed.

Upon motion duly made, the Committee adopted this paragraph.

The Committee agreed that a report should be prepared by the Reporter, ultimately to be sent to the Chief Justice with a letter from the Chairman. Inasmuch as there remains insufficient time to again circulate the report to the Committee members before adjournment of the Supreme Court in June, it was moved that the letter from the Chairman go forward to the Chief Justice as soon as possible and that the details of drafting the rule and Advisory Committee's Note be left to the Reporter and the Chairman.

It was further decided that if the Subcommittee on Detail could not meet early enough to decide the matter of combining paragraphs (1) and (2) that the Chairman and Reporter work the matter out to their satisfaction.

Judge Prettyman stated there had been suggestions of detail which had not been considered at the meeting because of insufficient time and a Subcommittee on Detail was appointed to consider all suggestions and comments which had not been taken up by the full Committee. The Subcommittee was to consist of Judge Friendly, Mr. Slade, and the Reporter.

It was decided by the Committee that the Reporter submit a new set of rules, working in all changes agreed upon at the meeting, and to include suggestions from the Subcommittee on Detail. The new set of rules will be circulated to all members of the Committee, allowing them 30 days from the day the Reporter sends them out for consideration. It was recognized that there would not be enough time for the Reporter

to complete this task before the standing Committee meets on June 28 but that when the new set of rules has been approved by the members that they be sent to the standing Committee for consideration.

Judge Maris stated that if the Enabling Act is passed in its present form it will make possible the changing of superseding statutory procedures with respect to the Tax Court appeals so that the time to take an appeal can be brought in line with the district courts, and that since this is problematical the standing Committee will want to contemplate the possibility of an earlier promulgation of those parts of the appellate recommendations which are presently comprehended with the civil and criminal rules. Judge Maris asked the Reporter to prepare a draft of proposed amendments to civil and criminal rules incorporating the rules which the Committee had adopted, so that the standing Committee may decide whether to recommend promulgation along with the civil and criminal rules, pending inclusion in the broad set of rules when they are promulgated.

The Reporter was instructed to thank the different organizations which had submitted comments and suggestions.

There being no further business the meeting adjourned at 3:10 p.m., May 19, 1955.