MINUTES OF THE AUGUST 1963 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES

The sixth meeting of the Advisory Committee on Appellate Rules convened in the Supreme Court Building on August 26, 1963, at 9:25 a.m. The following members were present during the session:

E. Barrett Prettyman, Chairman
Robert Ash
Stanley Barnes
William J. Jameson
Shackelford Miller, Jr.
Joseph O'Meara
Clarence V. Opper
Richard T. Rives
Samuel D. Slade
Simon E. Sobeloff
Robert L. Stern
Bernard J. Ward, Reporter

Mr. Willard W. Gatchell was unable to attend the meeting. Others attending all or part of the session were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, Will Shafroth, Secretary of the Rules Committees, and Joseph F. Spaniol, Jr., of the Administrative Office.

ITEM A. Approval and Adoption of Rules Previously Considered.

Rule 1. Scope of Rules

Final Action: Approved as drafted.

Rule 2. Suspension of Rules

Final Action: Approved as drafted.

Rule 3. Appeal as of Right -- How Taken

Judge Maris stated that the standing Committee, in considering this rule before publication, might want to propose an alternative procedure to sending copies of the notice of appeal to all parties to the appeal, and that the two alternative proposals might both be included in the preliminary draft circulated to the bench and bar.

Judge Rives suggested that 3(a) include language to cover the situation where the notice of appeal is presented to a district judge or to a single judge of the court of appeals, mainly in criminal and habeas corpus appeals. Judge Maris pointed out that these appeals in criminal and habeas corpus cases are not "filed" in the court of appeals, but merely "received" there and transmitted to the district court to be actually filed. He suggested language such as "If the notice of appeal is received in the court of appeals or by a district judge or a judge of the court of appeals from a defendant . . .". This suggestion was adopted in principle, and the Reporter was directed to make the appropriate changes in the draft.

Professor Ward recommended that the word "decision" in 3(b) be deleted. It was included to apply to Tax Court cases, but he felt that it would cause confusion in practice, since appeals are only taken from judgments and orders. On motion of Judge Barnes, the word was omitted from 3(b). Judge Jameson noted that "decision" is used in Rule 4(c), and the Reporter was directed to substitute "judgment" in that rule in the absence of any statutory requirement to the contrary.

Mr. Stern suggested that language be added to Rule 3(c) to the effect that where the United States is an appellee, service shall be made upon the office of the United States attorney or the division of the Department of Justice or the department or agency who handled the case, and in addition on the Attorney General of the United States. Mr. Slade felt that the government is adequately informed of cases in which it is an appellee without this new provision, and moved that the Rule be left as it is in that respect. This motion was carried.

Judge Friendly moved that in criminal and habeas corpus appeals, the rule should not require the appellant to provide extra copies of the notice of appeal for all the parties served, and this motion was carried.

Final Action: Rule 3 approved as amended, with drafting changes to be made by the Reporter.

Rule 4. Time for Filing the Notice of Appeal

Professor Ward called the attention of the Committee to the Admiralty Committee's proposal that all parties including the government be allowed only 30 days to file the notice of appeal. Some members of the Committee favored going along with this view if it were adopted as the final Admiralty-Civil position. Mr. Slade felt that allowing the government only 30 days to appeal would lead to many protective appeals being filed by the government. After some discussion, Professor Ward suggested that the government be allowed 60 days for an appeal,

but that all other parties in a case where the government is a party be allowed only 30 days. This procedure would be feasible in view of the Committee's provision for extra time for cross appeals. After further discussion, the Committee adopted Professor Ward's suggestion, and directed that the Committee note include a reference to the cross appeal procedure. Judge Maris agreed that it would be up to the standing Committee to resolve any inconsistencies between time periods in the Appellate Rules and the district court rules.

Judge Prettyman felt that some explanation of the meaning of "entry" of orders should be made, and the Committee agreed that a reference to Civil Rule 58 would be appropriate.

On Judge Miller's suggestion, the last paragraph of 4(a) and the corresponding paragraph in 4(d) were amended so that both would read: "Upon a showing of excusable neglect, the district court may extend the time for filing a notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time herein prescribed."

Mr. Stern suggested that in the first sentence of the second paragraph of (a), "hereafter enumerated in this rule" be changed to "...in this sentence", and without objection it was so ordered.

The last sentence of 4(c) was amended to read "...and shall be filed within 10 days after entry of the judgment."

Judge Friendly questioned whether the provision of the third sentence of 4(d) should apply to all cases, instead of only to criminal cases. After some discussion, the Committee felt it would not be good to clutter up the civil section of the rule with this type of provision, which is needed mainly in criminal cases. Judge Friendly moved that the sentence be amended to read: "When a notice of appeal has been filed after the announcement of a decision, sentence or order but before the entry of judgment it shall be treated as filed on the same day as such entry." This motion was carried.

The Committee next discussed the second sentence of 4(d), and voted to amend the sentence to read as follows: "A motion for leave to appeal in forma pauperis shall be treated as embodying a notice of appeal." Therefore, if the motion is denied, the defendant can continue his appeal by paying the docket fees.

In the fourth sentence of 4(d), the last phrase was amended to read "after entry of an order denying the motion." The next sentence was amended to read in part "...extend the time for appeal if the motion is made ...".

Professor Ward asked the Committee to consider the provisions of the last two sentences of Rule 4(d), dealing with the district judge's instructions to the defendant in a criminal case. He felt that this provision should appear in Rule 37 of the Criminal Rules rather than in the Appellate Rules. He further stated that he felt the provisions in Appellate Rule 37, dealing with in forma pauperis appeals, should also appear in the Criminal Rules. Judge Prettyman stated that there were many areas where the Appellate Rules would overlap the district court rules, and that when that situation arises, the appropriate committees should collaborate so that an identical provision would appear in the appropriate district court rules and also in the Appellate Rules. He further stated that it would be up to the standing Committee to finally decide these questions of placement of provisions.

The last two sentences of 4(d) were made a separate paragraph of the subdivision, and the paragraph will read as follows:

> "When a court after trial imposes sentence upon a defendant, the judge shall advise the defendant of his right to appeal and of the proceudre for seeking leave to appeal in forma pauperis if he is without funds, and if he so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant. A judgment or order is entered within the meaning of this subdivision when it is noted in the criminal docket."

The Committee agreed to include these two sentences in the Appellate Rules, and to recommend that the Criminal Rules Committee include the identical provisions in their rules on this subject.

Final action: Approved as amended, with drafting changes to be made by the Reporter.

Rule 5. Appeals by Permission under 28 U.S.C. § 1292(b)

Final Action: Approved as drafted.

Rule 6. Appeals by Allowance in Bankruptcy Proceedings

Final Action: Approved as drafted.

Rule 7. Bond for Costs on Appeal in Civil Cases

Mr. Slade stated that many clerks feel that a supersedeas bond is entirely separate from the cost bond, and suggested that the rule make clear that the amount for costs can be included in the supersedeas bond. Judge Prettyman suggested that the first sentence be amended to read in part: "...or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal,...". This suggestion was adopted by the Committee.

Final Action: Approved as amended.

Rule 8. Stay of Judgment or Order of the District Court Pending Appeal

Professor Ward questioned whether the rule should make a provision for the filing of a supersedeas bond when the court of appeals grants a stay. He suggested language such as "If the stay is ordered by a court of appeals subject to the posting of a bond, the bond shall be deposited in the district court, and such bond shall be actionable in accordance with the rules of the district court." Judge Rives moved the adoption of the Reporter's proposed language, and without objection it was ordered that the sentence be included after the present first sentence of the rule.

Mr. Slade asked whether the rule should include a time limit for applying for a stay. The Reporter replied that there are no time limits in the existing rules or law, beyond that imposed by the practical situation. The Reporter stated that he felt all supersedeas bonds should be considered by the district court, whether or not a notice of appeal has been filed.

Final Action: Approved as amended.

Rule 9. Bail

Judge Friendly suggested that the third sentence of 9(a) be amended to read in part: "...or that application has been made to the district court, and that the district court has denied the application or failed to afford the relief to which the moving party considers himself to be entitled, and the reasons given therefor." Without objection, it was so ordered.

In the second sentence, "district" was added before "court." In the last sentence of 9(b), "appellant" was changed to "parties." Judge Friendly moved that the second to last sentence of 9(a) be stricken, and without objection, it was so ordered.

Final Action: Approved as amended.

Rule 10. The Record on Appeal

Judge Friendly and Mr. Stern felt that the findings and opinion of the district judge should be included in the agreed statement, but Judge Friendly, after some discussion, withdrew his motion, since the following sentence permits the judge to supplement the statement with what he feels is necessary. Mr. Slade suggested that in the second sentence of 10(d) "appellant" be changed to "parties", and this suggestion was adopted. Judge Rives moved, after further discussion, that the sentence be stricken entirely, and this motion was carried.

Final Action: Approved as amended.

Rule 11. Transmission of the Record on Appeal

On Judge Maris' suggestion, the word "promptly" was stricken in the first sentence of subdivision (b).

Judge Barnes moved that Rule 11 permit local rules which would require the consecutive numbering of the pages of the record, with the exception of the transcript. He felt that this provided a better check on the completeness of the record. Judge Maris and several members of the Committee felt that numbering only the documents was adequate, and saved a lot of time for the clerk's office. Professor Ward stated that the rule as now drafted does not prevent the court's requiring numbering of pages. Judge Jameson moved that a statement be included in the Committee note that the rule does not prevent a court of appeals from requiring by rule or order the consecutive numbering of pages of the record. The motion was carried.

Judge Prettyman felt that the definition of "transmission" of the record should be explicitly stated in the rule, and suggested that language be included as follows: "Transmission is effected when the clerk of the district court mails or otherwise forwards the record to the court of appeals." This sentence would be followed by Professor Ward's suggested sentence, set out on page 8 of the materials: "The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date on which it is transmitted to the court of appeals." Judge Opper moved that Judge Prettyman's suggestions be adopted, and without objection, it was so ordered.

The Committee agreed to add a parenthetical cross-reference to subdivision (c) in the last sentence of (a). The phrase "(see subdivision (c))" was added after "request" to make clear in (a) that the appellant has a duty to get the extension if the record is not ready on time, and also to make clear the procedure for getting an extension.

Judge Opper raised the problem of the clerk of the Tax Court having to call up the litigants to ask them to request additional time for preparing the record. He felt that the court should be allowed to extend the time on its own motion. Professor Ward stated that the Committee had directed that the rule not allow the court to extend the time on its own motion. He felt that if this were permitted, the 40 day period would be extended many times at the request of the court reporter or the clerk, and would lose its effectiveness. Judge Friendly moved that the first sentence of subdivision (c) be amended to read: "The district court may, on motion, extend the time for transmitting the record; but in a civil case the motion for extension may be made . . .". Judge Maris and several Committee members felt that the rule should be left as it is, permitting the court to allow an extension without a motion in the case of the clerk's request or a similar situation. Judge Friendly's motion was lost, and the Committee adopted

the rule as drafted, substituting "motion" for "request" throughout.

Judge Rives moved that the last sentence of subdivision (a) be deleted since the Committee has agreed that a motion is not required in every case in which the time for transmitting the record is extended. The motion was carried.

Final Action: Approved as amended.

Rule 12. Docketing the Appeal; Filing of the Record

Judge Prettyman questioned the meaning of the phrase "cause the appeal to be docketed" in 12(c), and the Committee agreed to substitute the following for that phrase: "pay the docket fee if the docket fee is required". The third sentence of that subdivision was amended by adding "without requiring the payment of the docket fee" at the end of the sentence.

Final Action: Approved as amended.

Rules 13 and 14, the Tax Court rules, were deferred until the following day for discussion.

Rule 15. Review or Enforcement of Orders of Administrative Agencies, Boards, Commissions and Officers -- How Obtained.

At Mr. Stern's suggestion, the first sentence of subdivision (c) was placed as the final sentence of the subdivision. He also stated that the rule does not provide for service on the United States when it was not a party to the proceeding before the agency. Professor Ward suggested amending the pertinent sentence to read: "The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition; service on the United States shall be made on the Attorney General."

After a full discussion, Mr. Stern moved that the answer procedure of the uniform rule be substituted for the "notice of contest" procedure which appears in the draft of subdivision (b). Judge Maris was of the opinion that the answer procedure was more complete than that provided by the draft, and should be used in this rule since it is the basis for an order of enforcement in many cases. The motion was carried.

The Committee next considered Form 3, Petition for Review of Order of an Agency, Board, Commission or Officer. The Committee voted in favor of Judge Friendly's motion that the parenthetical expression in the form be amended to read: "(describe the order or part thereof being challenged)".

Final Action: Rule and Form approved as amended.

Rule 16. The Record on Review and Enforcement

Final Action: Approved as drafted.

Rule 17. Filing of the Record

The second sentence of subdivision (a) was amended in part to read: "...but the record need not be filed (1) unless the respondent has filed an answer which contests the enforcement of the order or (2) unless the court otherwise orders."

On suggestion of Mr. Stern, subdivision (b) was amended in part as follows:

"If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon order of the court or the request of a party, the record or any part thereof shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record thus retained by the agency shall be a part of the record on review for all purposes."

The Committee agreed to strike "and made part of the record" in the first sentence of subdivision (b).

Final Action: Approved as amended.

Rule 18. Prehearing Conference

The first sentence of the rule was amended to read as follows: "The court by rule or order may require 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, avoidance of duplication in briefs and arguments, and such other matters as may aid in the disposition of the proceeding by the court." Judge Friendly suggested that this rule would be useful in all cases, not only in agency appeals, and moved that the rule be transferred to the title covering General Provisions. The Committee voted in favor of this motion.

Final Action: Text approved as amended, and rule to be transferred to title on General Provisions.

Rule 19. Settlement of Judgments Enforcing Orders

The 10 and 5 day time periods were changed to 14 and 7 respectively.

Final Action: Approved as amended.

Rule 20. Applicability of General Rules to Review or Enforcement of Agency Orders

At Mr. Shafroth's suggestion, the Committee voted to add "of these rules" after "Titles VI and VII" so as to avoid confusion with titles of the U.S. Code.

The Committee discussed generally the use of Titles to group sections of the Appellate Rules, and agreed that it was a helpful system in locating rules on a subject, and in defining the applicability of the rules to agency and Tax Court cases.

Final Action: Approved as amended.

Rule 21. Application for Writs of Mandamus or Prohibition Directed to a Judge or Judges

The Committee discussed the possibility of extending the provisions of Rule 21 to the Tax Court and the agencies. It was the consensus of the Committee that a writ of mandamus or prohibition could issue against a judge of the Tax Court or against an agency, but that it would be better not to provide for the agency situation in this rule. The Committee agreed that a writ against an agency or officer thereof could be accomplished by a motion to the court of appeals. On motion by Judge Opper, the Committee voted to amend the first and last sentences of subdivision (a) by substituting "trial court" for "district court" and "court". This would make the rule applicable to judges of the Tax Court. Judge Opper further suggested that the words "of the court of appeals" be added after "clerk" in the first sentence of the rule, and this suggestion was adopted.

Professor Ward suggested that the rule be further amended in order to include in its scope all writs issuable under 28 U.S.C. § 1651. He suggested adding the substance of the third and fourth sentences of the second paragraph of the Note to the rule, thus providing for the motion practice to be used for the other extraordinary writs. The Committee approved and directed the Reporter to make appropriate drafting changes in the rule. The title was amended to include the other writs as follows: "Writs of Mandamus or Prohibition Directed to a Judge or Judges and Other Extraordinary Writs."

Final Action: Approved as amended, with Reporter to make drafting changes.

Rule 22. Filing and Service

After some discussion, the Committee directed the Reporter to rephrase the first two sentences of subdivision (d) to make clear that unless service is acknowledged, service should be certified by the person who made service.

Final Action: Approved, subject to changes in (d) by Reporter.

Rule 23. Computation and Extension of Time

Final Action: Approved as drafted.

Rule 24. Motions

Mr. Stern suggested that Rule 24 provide that an original and three copies of each motion shall be filed, and the Committee approved of this suggestion.

Judge Miller questioned the requirement for motions to be filed with the clerk. He stated that he often receives and acts upon motions himself before they are filed with the clerk, and several members agreed that a judge should be permitted to act on motions before they are filed with the clerk. Judge Maris felt that this provision should not be stated in the rule, so that filing motions with a judge would not be encouraged. After a full discussion, Judge Prettyman stated the consensus of the Committee: That something be included in Rule 24 to the effect that any motion which can be acted upon by a single judge may be received by the judge without the necessity of filing it with the clerk. The Reporter was directed to draft appropriate language to carry out this decision.

Final Action: Approved, with drafting changes to be made by Reporter.

Rule 25. Briefs

After some discussion, the Committee voted to adopt Dean O'Meara's suggestion that 25(a)(5) require "A short conclusion stating the precise relief sought."

Mr. Stern moved that "subject index" be changed to "table of contents" in (a)(1), and that the second sentence of (1)(1) be deleted, in order to require a table of contents in every case. The motion was carried.

Judge Barnes suggested that the rule include a provision similar to 9th Circuit Rule 18(f) which requires that where exhibits are referred to in the briefs, a table be included showing where the evidence was offered and where it was admitted or rejected. Following a full discussion, Mr. Stern suggested that the language of Supreme Court Rule 40(2) be adopted:

> "Whenever in the brief of any party a reference is made to the record, it must be accompanied by the record page number. When the reference is to a part of the evidence, the page citation must be specific. If the reference is to an exhibit, both the page number at which the exhibit appears and at which it was offered in evidence must be indicated."

It was the consensus of the Committee that this language be adopted and included in Rule 25, with the amplification that the page numbers where evidence was admitted or rejected shall also be included. The Reporter was directed to insert this provision at an appropriate point in Rule 25.

Judge Prettyman questioned the provision of the second paragraph of (e) requiring agreement by the parties to file typewritten copies of briefs with record references left open. He felt that the rule should provide that any party may file typewritten briefs, but that references to the original record must be included. These page references could then be changed to refer to the page numbers of the record in the printed appendix before the briefs are finally printed. Professor Ward felt that if this procedure were followed, there should be some statement to the effect that the briefs cannot be changed before they are printed. After further discussion, Judge Friendly moved that (1) the provision for filing typewritten briefs apply to any party, (2) that references to the original record be made in the typewritten briefs, and (3) that the briefs shall not thereafter be changed in any substantive way, and only typographical corrections and the inserting of the new record references will be permitted. The motion was carried.

Judge Maris suggested substituting another word for "final" in the last sentence of the paragraph, and the Committee approved this suggestion. In subdivision (g), "index" was changed to "table of contents".

Judge Miller asked the Committee to consider the 6th Circuit practice of requiring the statement of issues presented to be set out on the first page of the brief, and to limit the statement to one page. The Committee seemed in agreement that this would be a good idea, but no formal action was taken on the suggestion.

The meeting was adjourned at 4:30, August 26.
The meeting reconvened at 9:15, August 27.

ITEM B-3. Rule on Practice of Attorneys Before Courts of Appeals

The Committee first discussed the proposals on Admission to Practice, including the Reporter's alternate proposals and Mr. Stern's proposal. There was some discussion of the District of Columbia requirement of a character examination for admission to the court of appeals. No other court of appeals requires this, but Judge Prettyman explained the unique situation in the D. C. Circuit. He stated that he felt that the D. C. Court of Appeals would be sympathetic to a change in their rules which would conform with the Reporter's second alternative draft of this provision.

Dean O'Meara felt that a rule on this subject should not be included in the Appellate Rules, but should be left for each court of appeals to deal with by local rule. Other members of the Committee felt that this was an area in which uniformity would be particularly helpful to the bar. Professor Ward stated that

most circuits permit preliminary motions and papers to be filed by an attorney who is not a member of the bar, but an attorney must be admitted to practice before his oral argument. The circuits' provisions for the admission practice vary as to the sponsorship of the attorneys and the requirement for the applicant to be present in open court to be admitted.

Judge Friendly stated that he favored Mr. Stern's draft of the rule, and would favor a special provision exempting the District from the rule, if necessary. Professor Ward also spoke in favor of Mr. Stern's draft. He felt it provided stricter requirements than the rules of most of the circuits. Judge Maris suggested eliminating from Mr. Stern's draft the requirement of a certificate from a judge or the clerk of the court to which the applicant has been admitted, and require only the personal statement of the applicant to this effect. The Committee seemed in agreement with this suggestion.

It was the consensus of the Committee, after further discussion, that the second paragraph of the rule be amended to provide that the admission of an attorney to the bar of a court of appeals be sponsored by a member of the bar of the court, and the applicant must fill out the form for admission, giving his personal history, etc. The Committee also agreed that a motion for admission in open court was not required, but could be made on request of the applicant and his sponsor. An applicant would be permitted to be admitted in absentia.

Mr. Stern moved that the rule be redrafted by the Reporter to include features which would not require the presence of the applicant at the time of admission. The motion was carried, and the Reporter was requested to resubmit his draft of this rule to the Committee by mail.

Professor Ward asked for the Committee's views of subdivision (d) of the rule, providing for power of the court to discipline attorneys. On motion by Mr. Stern, the Committee voted to approved subdivision (d) as drafted.

Final Action: Approved, with changes to be made by Reporter.

ITEM B-1. Rule Respecting Cases which Involve Multiple Appeals

Professor Ward explained that he had included all the provisions respecting multiple appeals in one rule, but the Committee may think it advisable to put the provisions in the body of the general rules to which they apply.

The Committee discussed the provision in the second sentence of (b) for the time for filing the the record. Judge Friendly moved that the record be filed within 40 days of the filing of the final notice of appeal. Professor Ward felt that such a provision would cause unnecessary delay, since in many cases the cross-appellant does not need additional time for preparing the record. The Committee agreed that since the court could shorten the time for filing the record in an appropriate case, it would be better to have the 4- day provision, and Judge Friendly's motion was carried.

Judge Maris suggested that the first sentence of the second paragraph of (b) be changed to provide that the plaintiff below shall be regarded as the appellant. Mr. Slade felt that the Reporter's formulation was better since the party who appeals first is usually the most aggreived party. After further discussion, the Committee adopted Judge Maris' suggestion, as providing more consistency in practice.

On suggestion of Mr. Stern, the second sentence of the second paragraph of (b) was amended by substituting "as well as" for "immediately following", and the last sentence of the paragraph was stricken, since there is a general rule relating to reply briefs.

Professor Ward called the attention of the Committee to Judge Friendly's point about the obligation of counsel in a separate appeals situation to get together and avoid duplication in briefs and arguments. Judge Friendly moved that a provision be included in the rules that where appellants are raising the same legal points, an effort should be made to avoid duplication in the briefs and arguments. This motion was carried.

The Committee voted to amend Rule 25(c) to authorize additional briefs after the reply brief by leave of court. This would meet Mr. Slade's point that in some situations an appellee in a cross appeal has the main brief, and does not have the opportunity to file a reply brief.

ITEM B-2. Rule on Duties of Clerks

The Committee voted to approve the proposed rule as drafted.

Judge Rives questioned whether the rule should provide that law clerks not be permitted to practice law. There was some discussion on this point, and the Committee referred the question to the Reporter for further study.

ITEM B-4. Rule on Authority of Courts of Appeals to Adopt Local Rules

After some discussion, the Committee voted to adopt the following rule:

"Each court of appeals by action of a majority of the judges in active service thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules."

ITEM A, continued.

Rule 26. Brief of an Amicus Curiae

Judge Friendly suggested that the first two sentences be combined to read as follows: "A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of the court granted on motion." The Committee approved this suggestion.

Final Action: Approved as amended.

Rule 27. The Appendix to the Briefs

Judge Prettyman suggested that in 27(a)(4) "the parties" be changed to "any party". He further suggested that after "appendix" in the second sentence of (a), the words "(see subdivision (b))" be added. The Committee voted to adopt these suggestions.

Mr. Stern suggested that the first sentence of subdivision (d) read as follows: "Exhibits may be reproduced in a separate volume, suitably indexed." This language was adopted.

In the Committee note, the last paragraph of the Note to subdivision (a) was stricken, and the words "in order to alert counsel and the courts to the desirability of the practice in appropriate cases" was stricken from the last sentence of the preceding paragraph.

Final Action: Approved as amended.

Rule 28. Filing and Service of Briefs and the Appendix

In subdivisions (a) and (b) the time periods of 15 days were changed to 14 days. The first sentence of subdivision (d) was amended to read: "If an appellant fails to file his brief or the appendix within the time provided by this rule or any extension thereof, an appellee may move for dismissal of the appeal."

Final Action: Approved as amended.

Rule 13. Review of Decisions of the Tax Court
Rule 14. Applicability of General Rules to Review of Decisions of the Tax Court
Form 2. Form of Notice of Appeal for Review of Decision of the Tax Court

Judge Opper read the suggested changes in the Reporter's draft of Rules 13 and 14, in which he and Professor Ward had collaborated. He made one additional

suggestion: to insert an asterisk before the bracketed expressions in the form and add a note reading "*in the event the entire decision is not appealed from".

Judge Maris suggested that Rule 14 be amended to delete references to the Titles, and to read as follows: "All rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, 15-20, and 36-39 are not applicable."

Judge Barnes moved that Rules 13 and 14 and Form 2 be adopted as amended, and the motion was carried.

Final Action: Adopted as amended.

Rule 29. Form of Briefs, Appendices, Petitions, Motions and Other Papers

The Committee discussed the provision for colors of covers of the briefs, and on Judge Barnes' motion voted to strike the adjective "light" in all cases. It was also the sense of the Committee that typewritten briefs need not conform to this color requirement.

Judge Miller felt that in patent cases the pages of the briefs should be permitted to be larger to correspond with the size of pages of the appendix. The sentence dealing with patent cases in 29(a) was amended to add "and the briefs may be of corresponding size."

Final Action: Approved as amended.

Rule 30. Oral Argument

The Committee discussed the provision for 30 minutes for each side's argument. They approved the 30-minute requirement, since it may be superseded by local rules, and also the "each side" language, since in a "3-sided" case, for example, counsel may request additional time.

The Committee next discussed the Reporter's suggested addition to subdivision (b) of Rule 11, dealing with transmission of physical exhibits. The Committee approved the Reporter's draft, amending the first sentence to read as follows: "Documents in bulky containers and physical exhibits other than documents shall not be transmitted by the clerk . . .".

Judge Friendly suggested that the Committee note include a recognition of the multiple appeals problem and state that the second sentence of Rule 30(b) is intended to apply to such a situation. Without objection, this suggestion was adopted.

Subdivision (f) was amended to add the words "from the courtroom" after "promptly" in the second sentence.

Final Action: Approved as amended, with Reporter to make drafting changes.

Rule 31. Determination by the Court In Banc

Judge Maris submitted a draft of Rule 31 for the Committee's consideration. He stated that it was his view that it would be better to omit a rule on in banc hearings from the rules, since there is a great deal of disparity among the circuits in their practices. He further felt that a rule on this subject would encourage suggestions by attorneys for hearings or rehearings in banc.

Judge Sobeloff felt that the rule should discourage suggestions for in banc hearings by saying that all suggestions for rehearing will be addressed to the panel, but will be circulated to all the judges so that they may vote in favor of an in banc rehearing if they wish.

The Committee agreed that it should be made clear that circulation of the suggestion for an in banc hearing does not require the members of the court to vote on the suggestion or even to consider it. The fourth sentence of Judge Maris' draft was amended to read as follows: "The clerk shall transmit all such suggestions to all the circuit judges of the circuit in regular active service."

Judge Prettyman suggested that the rule contain an affirmative indication that hearings or rehearings in banc are not favored. After some discussion, the Committee voted to amend the last sentence of Judge Maris' draft as follows: "A hearing or rehearing in banc is not favored and will not ordinarily be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." The Committee then decided to make this sentence first in the rule.

The last sentence of the Reporter's draft was adopted as the last sentence of the rule: "A suggestion for rehearing in banc must be filed within the time prescribed by Rule 44." Judge Friendly proposed combining the last two sentences of the draft to say in substance: "Where counsel suggests a rehearing in banc it must be made in a petition for rehearing filed within the time prescribed by Rule 44." No formal action was taken on this suggestion.

Final Action: Adopted as amended.

Rule 32. Substitution of Parties

Subdivision (a) was amended by inserting "personal" before "representative" in the first sentence.

Final Action: Approved as amended.

Rule 33. Cases Involving Constitutional Questions Where United States Is Not a Party

The Committee directed that "this court" be changed to "the court" in the first sentence of the rule.

Final Action: Approved as amended.

Rule 36. Appeals in Forma Pauperis -- General Provisions

At Mr. Stern's suggestion, the second sentence of 36(a) was amended by adding at the end "without payment of fees and costs or the giving of security."

Final Action: Approved as amended.

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

Judge Barnes suggested that number 2a of the form be amended to read "Have you in the past 12 months received . . .". Judge Prettyman suggested that a list of persons dependent on the defendant for support be included as a question in the form, and both of these suggestions were adopted.

Final Action: Approved as amended.

Rule 37. Appeals in Forma Pauperis from Judgments of Conviction

Judge Friendly suggested that in the fifth sentence of the rule, either "conclusive" or "clearly" be deleted, and the Committee voted to delete "conclusively".

Judge Barnes questioned the meaning of the phrase "whether counsel is available to the defendant" in the first sentence. After some discussion, the phrase was changed to read "whether the defendant has or can obtain counsel" and the beginning of the next sentence was amended to read as follows: "If not, the court shall offer . . .".

The Committee approved submitting this draft to the Criminal Rules Committee for inclusion in Rule 37(a)(1). The rule would then appear both in the Criminal Rules and in the Appellate Rules.

Final Action: Approved as amended.

Rule 38. Habeas Corpus Proceedings

Judge Maris stated that since there is statutory power for a circuit judge to grant a writ of habeas corpus, the phrase "circuit judge" should be substituted for "judge of the court of appeals" in the second and third sentences of 38(a). He suggested that in the third sentence of (b), "district court" be changed to "district judge", and that the third, fourth and fifth sentences of (b) read as follows:

> "If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the circuit judges thereof and shall be considered by a circuit judge or judges in accordance with the rules or order of the court. An appeal may not be taken unless the district judge or a circuit judge issues a certificate of probable cause."

At the suggestion of Judge Maris, the first sentence of the last paragraph of the note was amended in part to read "...but must regard the request as made to the circuit judges who constitute it."

Final Action: Approved as amended.

Rule 39. Habeas Corpus Proceedings -- Custody of Prisoners

The Committee discussed the last sentence of subdivision (a). It was felt that it was not clear that "substitution" referred to the substitution of a new custodian of the prisoner, and after some discussion, the sentence was amended to read in part "...substitution of any successor custodian so that the case will not become moot."

Judge Rives suggested that subdivision (e) be amended to read as follows: "For the purpose of this rule a case is pending in the district court until a notice of appeal is filed, and in the court of appeals thereafter until a mandate is issued or until a writ of certiorari is granted." This amendment was adopted.

Mr. Slade later asked that the Committee reconsider its action on 39(e). He stated that he felt the rule as drafted by the Reporter carried out the intention of the Supreme Court to retain jurisdiction of the habeas corpus case in the court of appeals until the time period for certiorari has expired regardless of whether the mandate has been sent to the district court. Under the Reporter's draft the custody of the prisoner cannot be disturbed until the certiorari period has expired. Judge Rives moved that the Committee reconsider its decision and vote to leave 39(e) as originally drafted by the Reporter. The motion was carried.

Final Action: Approved as amended.

Rule 40. Entry of Judgment

Judge Maris stated that he felt the rule should conform to the Civil Rule in saying that "The clerk shall prepare, sign and enter the judgment", and that this formulation should be carried throughout the rule. The Committee was in agreement with this view, and the rule was amended accordingly.

Final Action: Approved as amended.

Rule 41. Interest

The Committee discussed the Reporter's Note 2 to Rule 41. Professor Ward recommended that the sentence originally presented to the Committee be restored as the second sentence of the rule, as the present sentence would have the effect of encouraging appeals from the award of interest by the district court. After some discussion, the Committee voted to restore the former provision as follows: "If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to the allowance of interest."

Final Action: Approved as amended.

Rule 42. Damages for Delay

Judge Opper moved that the rule be amended to read as follows: "If an appeal delays proceedings on the judgment of the district court or on the decision of the Tax Court, and appears to have been taken merely for delay, the court may award just damages or double costs to the appellee." This motion was carried.

Final Action: Approved as amended.

Rule 43. Costs

At Judge Maris' suggestion, the Committee voted to change "Judgment" to "Mandate" in the caption of subdivision (d). Judge Barnes moved that in subdivision (c) 10 days be changed to 14 days, and this motion was carried.

Final Action: Approved as amended.

Rule 44. Petition for Rehearing

Judge Barnes moved that 15 days be changed to 14 days in the first sentence. Mr. Stern felt that 21 days would be better from the attorney's standpoint. Judge Friendly felt that 14 days would be sufficient and would help to cut down the delays after the decision. The Committee voted in favor of the 14 day period.

Judge Friendly called the attention of the Committee to his suggestion (set out on page 2 of the materials) that a petition for rehearing directed to matters in the opinion be filed 15 days after the filing of the opinion. He moved that the Reporter's suggested language be inserted as the second sentence of the rule, changing 15 days to 14 days. The motion was carried.

Mr. Stern moved that the number of copies required for the petition for rehearing be the same as the number required for the briefs, and the Committee voted accordingly to change "twenty" to "twenty-five" in the last sentence of the rule.

Final Action: Approved as amended.

Rule 45. Issuance of Mandate

Judge Barnes moved that in the first line of the rule 21 days be substituted for 20 days, and without objection it was so ordered.

Judge Maris felt that the mandate should include any directions which the court of appeals may have as to costs, and the Reporter was directed to include an appropriate provision in the rule.

On Judge Friendly's motion, the Committee voted to adopt in lieu of the second sentence of (b), the Reporter's suggested language at the top of page 3 of the materials: "The stay shall not exceed 30 days unless the period is extended for good cause shown."

Final Action: Approved as amended, with drafting changes by Reporter.

Rule 46. Voluntary Dismissal

Judge Sobeloff moved that "either" be changed to "each" in the fourth line of the rule, and without objection it was so ordered.

Judge Opper suggested that the last sentence of the rule be amended as follows in order to make it clear that the rule applies to Tax Court cases: "If an appeal from a judgment of a district court or a decision of the Tax Court has not been docketed, the trial court may dismiss the appeal...". The motion was carried, with the stipulation by Judge Opper that the Reporter may delete the amendment if it is not consistent with the treatment of Tax Court cases in other rules.

Final Action: Approved as amended.

PROCEDURAL MATTERS

Judge Prettyman stated that as a result of this meeting, the Committee's proposals are in substantial form to be submitted to the standing Committee. He asked whether the Committee would agree to circulating drafts of rules which the Reporter was directed to revise and obtaining a mail response from the Committee. Dean O'Meara moved that unless the correspondence indicates a further meeting of the Committee, the rules approved at this meeting plus the new sections which the Reporter has been directed to draft be transmitted to the standing Committee for its consideration before circulation to the bench and bar. This motion was unanimously carried.

Judge Prettyman next asked the Committee to authorize a letter of transmittal to the standing Committee setting out the instructions given the Committee by the standing Committee, and describing the work of the Committee. Approval was given to the drafting of such a letter, and Judge Prettyman was authorized to sign the letter for the Committee.

The Chairman next asked the Committee for its views on the recommendation to the standing Committee as to the placement of the rules which deal somewhat with the district courts and somewhat with the courts of appeals. Professor Ward stated that his proposal would be to publish (1) A letter of transmittal to the standing Committee as described above, (2) A set of Appellate Rules, and (3) Amendments to the various district court rules made necessary by the Appellate Rules. (These would be submitted to the appropriate Committees for approval before publication.) The Committee agreed that it should recommend to the standing Committee that where the Civil Rules (for example) differ from the Appellate Rules, the Civil Rule should be amended to conform to the Appellate Rule. Judge Opper moved that the Committee include in its recommendations to the standing Committee amendments to existing district court rules made necessary to bring them into harmony with the Appellate proposals. This motion was carried.

Judge Maris stated that the problem of getting authority to promulgate rules for the courts of appeals was one that the standing Committee would have to deal with, and that he would welcome suggestions from this Committee as to the recommendation to be made to the Judicial Conference. He stated that some of the rules could probably be adopted under the Supreme Court's present authority to make rules for the district courts. Judge Friendly felt that the Committee should strongly recommend that enabling legislation be sought to enable the Supreme Court to prescribe rules for the courts of appeals. In that event, the great bulk of the Committee's recommendations could be included in a set of Appellate Rules, and there would be few cases where amendments would be necessary to the Civil, Criminal and Bankruptcy rules. Dean O'Meara moved that the Appellate Committee recommend to the standing Committee that the enabling act for the Civil Rules be amended to extend rulemaking power for the courts of appeals. This motion was unanimously carried, and Judge Maris

indicated that he would consider presenting this proposal to the Judicial Conference at its meeting in September.

At the conclusion of the meeting, Judge Prettyman expressed his appreciation to all the members of the Committee for their participation in the Committee work, and the Committee unanimously voted to adopt the following resolution of appreciation to Professor Ward for his services thus far as Reporter of the Committee:

> **RESOLVED**, that the Advisory Committee on Appellate Rules record its appreciation of the services rendered to it by its Reporter, Professor Bernard J. Ward, who, in a remarkably short time, has accomplished the difficult task of enabling the Committee to formulate uniform rules governing the procedure for appeals in the United States Courts of Appeals. The Committee's appreciation is both professional and personal. Professor Ward has shown outstanding scholarship and skill in draftsmanship and his relations with members of the Committee have been marked by the combination of tact and firmness essential to the successful accomplishment of his task.

The meeting was adjourned at 4:30, August 27, 1963.

* * *