MINUTES OF THE NOVEMBER 1962 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES

The fourth meeting of the Advisory Committee on Appellate Rules convened in the Supreme Court Building on November 19, 1962, at 9:30 a.m. The following members were present during the session:

E. Barrett Prettyman, Chairman
Robert Ash
Stanley Barnes
Henry J. Friendly
Willard W. Gatchell
William J. Jameson
Shackelford Miller
Clarence V. Opper
Samuel D. Slade
Simon E. Sobeloff
Robert L. Stern
Bernard J. Ward, Reporter

Judge Richard T. Rives and Dean Joseph O'Meara were unable to attend.

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, Professor James William Moore, a member of the standing Committee, and Will Shafroth and Joseph F. Spaniol, Jr., of the Administrative Office.

ITEM A. Preliminary Draft of Proposed Rules Respecting the Record on Appeal, Transmission of the Record, and Filing of the Record

Rule 16. The Record on Appeal.

Judge Prettyman stated that this draft is the result of committee decisions at the May 1962 meeting.

On Judge Friendly's motion, the committee voted to revise the second sentence of Rule 16(d) to read as follows:

> "The statement shall include a copy of the judgment appealed from, a certified copy of the docket entries, and a summary of the contentions of the appellant."

Professor Ward asked that the committee consider his suggestion, as set forth in the Reporter's Note to subdivision (f), that this subdivision be transferred to Rule 17, which deals with transmission of the record. Without objection, it was so ordered.

Rule 17. Transmission of the Record on Appeal.

17(a). The committee discussed the provision in (a) that the clerk shall number the pages of the record. Judge Barnes felt that numbering the pages consecutively facilitated referring to the record in the briefs. Judge Maris suggested that the committee consider the Third Circuit practice of numbering the documents, in chronological order, that are sent from the district court to the court of appeals as part of the record. He stated that this conforms to the statute on agency cases.

Mr. Stern moved that it be sufficient for the clerk of the district court to number the documents comprising the record, and that the reporter be instructed to make the appropriate drafting changes in Rule 17(a). The motion was carried.

17(b). The Reporter explained that this provision was drafted so as to clearly indicate to the parties that they control the content of the record. Judge Barnes felt that the phrase "at any time during the pendency of the appeal" may cause delay if requests for additional material are made shortly before the hearing. Judge Maris interpreted this language to mean that the party may request additional material but it would not be necessary to have the material in the court of appeals before the hearing. The committee tentatively approved Rule 17(b) as drafted, but deferred a vote pending discussion of Rule 18.

17(c). It was the consensus of the committee that papers on file in the district court are a part of the record on appeal whether or not they are transmitted to the clerk of the court of appeals. However, the papers may be transmitted if the judge or the parties request them.

Judge Friendly moved that Rule 17(c) be amended to read as follows:

> "The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their

transmittal. The parts thus designated shall be a part of the record on appeal for all purposes."

The motion was unanimously carried.

Rule 18. Filing the Record on Appeal.

Mr. Stern distributed to the committee a memorandum containing his comments and recommendations with respect to Rule 18. He suggested a more orderly arrangement of the rule, and stated that in his opinion the words "cause" and "insure" as used in Rule 18 were not sufficiently clear in meaning, and in indicating the duty of the appellant in transmitting the record to the court of appeals. He also suggested that the district court clerk be instructed to transmit, i. e. send, the record within 40 days, and that it not be necessary that it be received in the court of appeals within 40 days.

Professor Ward explained that this rule was drafted to place the duty of seeing that the record be transmitted on the appellant, but to retain the provision that the clerk of the district court actually transmit the record to the clerk of the court of appeals. He stated that each clerk in the district court knows what his time limitations are as far as mailing the record in time for it to reach the court of appeals within the 40 days.

The committee agreed that most delay in transmitting or receiving the record is caused by delay in preparation of the transcript, and that 40 days -- whether for transmittal by the district court clerk or for receipt by the clerk of the court of appeals -- was the minimum time that should be allowed.

Judge Friendly, Judge Miller, and Mr. Gatchell spoke in favor of the rule as drafted. Judge Friendly felt that words such as "cause" and "insure" have the function of suggesting that the attorney has responsibility in this procedure beyond merely giving directions to the clerk's office to prepare the record.

Judge Jameson, Mr. Slade, and Judge Opper agreed with Mr. Stern that the attorney should be given some directions to keep in contact with the clerk's office with respect to the progress being made in preparing the record and transmitting it to the clerk of the court of appeals. Mr. Slade felt that Mr. Stern's language "take all necessary steps" would permit a good flexibility in this procedure.

Judge Sobeloff explained the practice of the clerk in the Fourth Circuit to get in touch with the attorneys as soon as the notice of appeal is filed, to tell them what is expected of them, and to urge them to order transcript and keep in touch with the clerk's office during the preparation of the record. He felt that this could be set up as an administrative procedure, rather than by including it in a rule.

It was the consensus of the committee that the major burden of seeing that the record is transmitted in time should lie with the appellant's attorney, but that the actual transmittal should be made by the clerk of the district court.

Judge Maris felt that Rule 17 clearly states that the clerk shall transmit the record, and that the appellant shall "cause the record to be filed" by paying the docket fee to the clerk of the court of appeals. He agreed with Mr. Stern's idea of putting responsibility (including ordering the transcript and giving the clerk ample notice to get the papers together) on the attorney, but felt that this provision belongs in Rule 17.

Mr. Stern moved that the rules require the district court clerk to transmit the record to the court of appeals within 40 days after filing of the notice of appeal, unless the time is extended, and that this be made clear in Rule 17 and Rule 18. The motion was carried.

Mr. Stern moved that the following language, set out in his memorandum, be incorporated in Rule 17 or Rule 18, wherever it most appropriately belongs after redrafting:

> "The appellant should take all steps necessary to permit the clerk of the district court to transmit the record to the court of appeals within 40 days from the date of filing the notice of appeal, unless that time is reduced or extended as permitted under paragraph (b) of this Rule."

The motion was amended to state that the material should be included either in the rule or a note, and was carried as amended.

Judge Sobeloff moved that Mr. Stern's language, quoted above, be included in the text of the rule. The motion was carried.

The committee agreed that the record shall be considered "transmitted" when it leaves the office of the clerk of the district court en route to the clerk of the court of appeals, and without objection it was so ordered.

Judge Maris suggested that Rule 18 state that when 40 days is actually used before transmittal, the filing date should be extended by the time used in transmittal. No formal action was taken on this suggestion.

Mr. Stern moved that Rule 18 be reorganized, as stated in his memorandum:

> "for (a) to cover what must be done with respect to filing without an order changing time, (b) to cover everything about enlarging or reducing the time by either court, and (c) to cover the filing fee and what constitutes what we now call docketing."

Judge Prettyman began discussion of Rule 18(b) by giving the following summary of the committee discussions:

> "We pin the days to the act of the clerk of the district court starting the record on its way to the clerk of the court of appeals. He must do this within 40 days. Sometime thereafter, depending on transportation, the clerk of the court of appeals gets the record. He is due another item -- $25.00 -- which he may or may not have already received. Now, to pick up the sentence of 18(b), 'Upon timely receipt of the record and of the docket fee, the clerk of the court of appeals shall file the record.' You have accomplished the filing of the record but you have not put any time limit on filing. The clerk does that [file the record] when he gets the record and the docket fee."

Judge Maris added that what is meant by "timely receipt" in 18(b) is 40 days plus the time it takes for mailing or transit from the district court clerk to the clerk of the court of appeals.

Judge Sobeloff moved that the appellant be required to pay the $25.00 docket fee to the clerk of the district court so that it would be transmitted along with the record to the clerk of the court of appeals. He felt that this procedure would permit the appellant to complete his obligations when the record is transmitted. Several members of the committee felt that collection of this fee would not be a proper duty of the district court clerk. Mr. Slade pointed out that often it is more convenient for the appellant to deal with the clerk of the court of appeals than with the district court clerk. The motion was not carried.

Mr. Stern moved that the docket fee be paid to the clerk of the court of appeals within 40 days of the filing of the notice of appeal. The motion was carried.

Mr. Stern further moved that the provisions for extending or reducing the time for docketing the appeal and transmitting the record be combined into one section of Rule 18, and without objection, it was so ordered.

Judge Maris raised the point that it is not appropriate to fix in the rule the amount of the fee, since the Judicial Conference has the statutory power to fix the fees. He suggested substituting "the docket fee prescribed by the United States under Title 28, U.S.C., § 1913" for "the docket fee of $25.00", and that the note state that at present the fee prescribed is $25.00. This change would also apply to the Tax Court Rule. The committee voted to adopt Judge Maris' suggestion.

Judge Opper questioned whether there were fees payable to the district court clerk in connection with preparation of the record. He moved that Rule 17(a) be amended so that the first sentence would read:

> "The clerk of the district court shall, upon payment of the requisite fees, transmit the record . . . "

The reporter stated that there were no such fees payable to the district court clerk, and the motion was not carried.

It was the consensus of the committee that the provisions contained in Rule 18(c) be incorporated with the other provisions in Rule 18 dealing with extensions of time.

Mr. Stern and Professor Ward were requested to work on the redrafting of Rules 17 and 18 in accordance with the decisions of the committee, and to present a draft of these rules at the next day's session.

Judge Barnes moved that the last sentence of 18(c) be amended to read:

> "If a previous request for an extension of time for filing the record has been denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given."

This would provide for the situation where a request for an extension of time has been denied by either the appellate or the district court. Without objection, it was so ordered.

Professor Ward explained that in 18(d) the only change from the previous draft was in the last sentence. The committee approved the change without objection.

Judge Barnes questioned the provision in Rule 18(d) for "4 days' notice in writing". Professor Ward explained that this was the amount of time generally allowed by the circuits. Mr. Stern moved that "4" be changed to "10". Judge Barnes amended to motion to change "10" to "7". Judge Maris and Professor Ward spoke in favor of using 7 or multiples of 7 as time limits throughout the rules. In this way, the problem of intervening weekends is largely eliminated, since a time period which begins on Wednesday will expire on the following Wednesday, etc. The motion, as amended, was carried.

Judge Opper suggested that in redrafting the Reporter consider putting the material now in Rule 18(e) after the material covered in 18(b), to make it clear that after the record is filed by the clerk of the court of appeals, the clerk should at that point give notice to the parties.

[The following discussions and actions on Item A took place on Tuesday, and are included here in order to combine all the actions on this topic.]

Mr. Stern and Judge Maris distributed drafts of Rules 17 and 18 reflecting the committee decisions of the previous day.

The committee first considered the draft prepared by Judge Maris. He explained that his draft was based on this theory: There are three things that take place in connection with perfecting an appeal --

(1) Preparation and transmission of the record. This is done at the district court with the assistance of counsel. (2) Docketing of the appeal in the court of appeals. This also calls for the assistance of counsel. (3) Filing of the record in the court of appeals after it has been transmitted to the court of appeals by the clerk of the district court. This is a clerical and administrative procedure, and does not call for any action by the attorney. He stated that in his view the time limits applicable to lawyers involve two things -- the transmittal of the record and the docketing of the appeal (paying the $25.00 fee). Filing should follow as a matter of course the transmittal by the clerk of the district court, and the clerk of the court of appeals will automatically file the record provided the docketing has been done by the attorney.

Judge Barnes moved that some language be inserted in Rule 18(e) of Judge Maris' draft which would allow the clerk to docket the appeal for the purpose of hearing a motion to dismiss without requiring payment of the docket fee. Without objection, it was so ordered.

Mr. Stern moved to combine sections (c) and (d) of Judge Maris' draft of Rule 18 into one subdivision with two paragraphs, since both (c) and (d) deal with reduction and extension of time for docketing the appeal and transmitting the record. The motion was carried.

Mr. Gatchell moved that the phrase "without motion and notice" in the second sentence of 18(c) be amended to read "without motion or notice". Without objection, it was so ordered.

Judge Maris suggested that the subdivision dealing with reduction and extensions of time be stated in the alternative, i.e., "Reduction or extension of time for docketing the appeal or transmitting the record or both." The committee voted to adopt this suggestion.

Mr. Stern questioned the provision of 18(e) of Judge Maris' draft stating that "If the appellant shall have failed to effect timely docketing of the appeal and transmittal of the record, . . ." Judge Maris explained that there should be some statement in the rule of the appellant's duty to see that the record is prepared in time to be transmitted within the prescribed period to the clerk of the court of appeals. The Reporter was asked to consider language which would clarify this provision. Judge Maris suggested that the Advisory Committee Notes to these rules could largely explain the provisions by referring to the original papers rule, which changed the method by which the record and transcript are prepared.

Judge Barnes asked for clarification of the provisions of (a) and (b) of Judge Maris' draft of Rule 18, dealing with docket entries. Judge Maris and Judge Prettyman explained that the first entry will be made when the fee is received and will consist of preparing a docket sheet and noting that the fee has been paid. The second entry, provided in (b), will be a separate entry on the docket sheet noting the filing of the record. If the record is received before the docket fee, the record is held without a number until such time as the fee is received and the docket sheet prepared.

Mr. Stern moved that language stating that the appellant shall promptly "request the clerk to prepare and transmit the record" be inserted in the first sentence of Rule 17(b). The motion was withdrawn, since it was the consensus of the committee that the notice of appeal serves as a reminder to the clerk of the district court to begin the preparation of the record.

Judge Opper moved that the first sentence of Rule 17(a) be revised to read:

> "The clerk of the district court shall transmit the record to the court of appeals within 40 days of the filing of the notice of appeal or such other time as is prescribed pursuant to Rule 18."

The motion was carried.

It was the consensus of the committee that the Advisory Committee Notes will explain the concepts involved, including the definition of transmittal.

The committee approved Judge Maris' draft of Rules 17 and 18 as amended, and subject to drafting improvements by the Reporter.

ITEM C. Preliminary Drafts of Proposed Rules on the Appendix to the Briefs, Filing and Service of Briefs and Appendices, and Form of Briefs, Appendices, Petitions, Motions and Other Papers.

Rule 33. The Appendix to the Briefs.

Mr. Slade objected to the requirement in Rule 33(a) that the entire charge be included in the appendix. He felt that only the relevant

portions of the charge should be included. Judge Sobeloff agreed. Mr. Slade moved that Rule 33(a) be amended to read:

> ". . . (2) any relevant pleading, relevant portions of the charge, finding and opinion; . . ."

Without objection, it was so ordered.

Judge Barnes explained the newly adopted practice of the 9th Circuit that appendices are not required to briefs. Instead, three copies of the record are sent to the court of appeals, and these copies circulate among the judges of the court of appeals, and, occasionally, may be lent to the parties. The committee differed as to whether this was a forward or a backward step. Judge Barnes stated that the system has not been in effect for a long enough period to draw any conclusions about it. Judge Prettyman stated that the last paragraph of 33(a) as drafted permits this practice in individual cases. Mr. Stern asked the committee to reconsider the system of not requiring appendices to briefs in the light of the action of the Ninth Circuit adopting the system in all cases.

Mr. Gatchell moved that the second paragraph of Rule 33(a) be amended to insert "by rule or order" after "court". Judge Barnes moved that the words "and such copies as it may require" be inserted after "record" in the same paragraph. Both motions were carried, and the second paragraph of 33(a) was amended to read:

> "The court by rule or order may dispense with the requirement of an appendix and permit an appeal to be heard on the original record and such copies as it may require, or it may permit a typewritten appendix to be filed."

In Rule 33(b) the word "questions" in the second sentence was changed to "issues". The third sentence, on the suggestion of Judge Maris, was rearranged to read:

> "The appellant shall include in the appendix the parts thus designated."

Judge Friendly raised the point that the last sentence of (b) does not specifically cover the situation where the party has over-designated the appendix, has paid the costs, and the court orders that he shall not recover all of his costs in printing the record. This matter was referred to the Reporter for his consideration.

Judge Maris commented that this rule in effect produces a separate appendix which is printed together. This is essentially the practice followed in the District of Columbia Circuit, and which has worked out well there.

Professor Ward explained that the draft of Rule 33(c) evolved after correspondence with Judge Maris and Mr. Stern, and he invited the suggestions of the committee for improvement. Judge Maris and Judge Friendly felt that it was not necessary to state in the briefs the page in the appendix at which various documents appear and to which references are made if the appendix is arranged in chronological order. Mr. Gatchell added that it is not necessary to include the page numbers of the appendix in the title of each section.

Mr. Gatchell moved that the words "an alphabetical" in the first sentence of Rule 33(c) be stricken and the words "a chronological" be inserted in lieu thereof, and that the material after "in the briefs" in the same sentence and all of the third sentence be stricken. The motion was carried.

Judge Maris suggested that the words "or parentheses" in the second paragraph of Rule 33(c) be stricken, so as to make it clear that brackets are the only acceptable symbols for indicating original page numbers of the record in the appendix. Without objection, it was so ordered.

Mr. Stern moved that the last two sentences of the first paragraph of 33(c) be combined to read:

> "The page or pages of the appendix at which each part of the record thus listed appears shall be set out opposite each listing in a column at the right, so as to permit immediate location in the appendix . . ."

Without objection, it was so ordered.

Mr. Slade requested that the committee consider as an alternative procedure to that set out in Rule 33(c), the procedure of filing typewritten or page proof briefs, with blanks for references to the appendix, and that when the joint appendix is in final form, the appropriate page numbers be inserted in the briefs, and the briefs then printed in final form. There was no objection to this alternative procedure. Judge Friendly stated that it may more properly belong in Rule 32(e). Judge Maris suggested that this procedure be included as a provision of Rule 32(e), and the committee voted to adopt this suggestion.

Professor Ward stated that Rule 33(d) permits the exhibits to be reproduced by other methods than that used to reproduce the appendix.

Rule 34. Filing and Service of Briefs and the Appendix.

Professor Ward suggested that the committee may want to delete the language "but at least one day before the argument" in Rule 33(a), third sentence. This would permit the reply brief to be filed after the argument in cases where the date of the argument falls before the 15 days have expired. Mr. Stern moved that the language be stricken, and the motion was carried by a vote of 5 to 4. Judge Barnes moved that the language "but at least three days before the argument" be inserted in place of the stricken language. The motion was carried, with the understanding that the court could grant exceptions to this provision, allowing the reply brief to be filed after the argument in some cases.

Judge Friendly moved that the phrase be amended as follows: "but, except for good cause shown, at least three days before the argument." The motion was carried.

The committee agreed to strike "receipt of" in subdivision (b) so that the phrase would read ". . . within 15 days after service of the brief of the appendix."

Professor Ward called the committee's attention to the provision in Rule 34(c) which requires three copies of the brief and appendix to be served on counsel for each party. Judge Sobeloff moved that this sentence and the corresponding provision in Rule 33(d) be amended to read ". . . shall be served upon counsel for each party separately represented." Without objection, it was so ordered.

Judge Friendly moved that the committee add to Rule 34(a) a statement that where typewritten briefs are permitted an original and three legible copies of such papers shall be filed with the clerk and one copy served upon counsel for each party separately represented. He further moved that the following be added to Rule 34(c): "In cases where typewritten briefs are permitted, one copy shall be served upon counsel for each party separately represented." The reporter was directed to phrase these provisions to show that they apply to appendices as well as to briefs which are typewritten. Without objection, it was so ordered.

The Reporter's draft of Rule 35 was approved as drafted.

ITEM D. Tentative Draft of Proposed Rule on Briefs

Rule 32. Briefs.

Judge Maris suggested that "plaintiff" and "defendant" be substituted for "plaintiff-appellant" and "defendant-appellee" in Rule 32(a)(3). He felt that the last sentence of (a)(3) gives a clear meaning to the terms used above. The committee also agreed that the substance of the Fourth Circuit Rule, adopted June 8, 1960, and providing that it is desirable for the parties to be referred to in the same order and by the titles used in the district court, should be included in the rules. Without objection, it was so ordered.

Mr. Stern raised the question of requiring different colors for covers of the briefs of the appellant and appellee, and for reply briefs. The consensus of the committee was that this is helpful both to the lawyers and the judges, and that as a practical matter does not cause much of a problem in printing. He moved that this provision be included at an appropriate point in the rules, and the motion was carried.

Judge Barnes asked that the Reporter consider including a provision requiring that the briefs contain a statement of the jurisdiction of the district court and the jurisdiction of the court of appeals in each case.

Mr. Stern moved that the first sentence of Rule 32(a)(4) be amended to read as follows:

> "The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, citing the authorities and statutes relied on."

and that the second sentence be stricken. Without objection, it was so ordered.

Judge Opper moved that 32(b) be amended to read:

> "The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(4), except that no statements of the case or of the issues need be made unless the appellee is dissatisfied with the statement of the appellant."

Without objection, it was so ordered.

Rule 32(c) was approved as drafted by the Reporter.

Mr. Slade moved to strike all of subdivision (d). He felt that when newly enacted legislation or other new matter comes up, the court

will allow it to be included for consideration. He felt that this is an informal procedure and that no provision need be made for it in the rules. Without objection, it was so ordered.

The reporter was directed to redraft 32(g) so as to clarify the distinction between standard printing and copies of briefs produced by some reproduction of original typewritten pages. He was also requested to draft language to indicate that the addendum of statutes mentioned in 32(f) would not be included in the 50 or 70-page limit for length of briefs.

Mr. Gatchell moved that the phrase "unless supplied to the court in pamphlet form." be added to 32(f). Judge Opper further moved that the word "appendix" in (f) be changed to "addendum", in order to eliminate its confusion with the appendix to the briefs consisting of the record. Both motions were carried.

Judge Barnes asked for clarification of the words "other citations" in Rule 32(g). Judge Opper moved that the phrase be amended to read "tables of citations" and that this would refer to all types of citations, cases and texts, treatises, etc. The motion was carried.

Rule 32 was approved as amended.

Rule 36. Brief of an Amicus Curiae.

Mr. Ash moved that the second sentence of 36(a) be stricken. He felt that it would be a mistake to allow the United States or any subdivision of government to file an amicus brief as of right in appellate litigation. Mr. Slade thought there may be statutory provisions to allow the United States, through the Attorney General, to appear and make known in any court the interests of the United States. He agreed to make a brief investigation of this and report at the next day's session.

The meeting adjourned for the day at 4:30 p.m.
The meeting reconvened at 9:30 on November 20.

Mr. Slade reported on the statutory provision of 5 U.S.C. § 309:

> "Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which

> the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Mr. Slade felt that before the committee dealt with this problem by procedural rules, we should determine whether this is an area covered by statutory language which has been given broad construction by the Supreme Court. He felt that while the committee might not want to expressly permit this procedure of amicus curiae briefs as of right by the Attorney General or any agency, the procedure should not be expressly or implicitly forbidden. Judge Friendly stated that he would interpret the statute as meaning that the Attorney General or agency would be required to come to the court with a motion to file the amicus brief, but that the court would automatically allow it on the basis of the statutory provision.

Mr. Ash's motion of the previous day was restated, to strike out the second sentence of 36(a), but not to include any language that could be construed as prohibiting amicus curiae briefs by the United States or agencies thereof. The motion was carried.

Judge Friendly moved that the following language be inserted at the end of the first sentence of 36(a) as drafted by the reporter: ". . . or if the right to file such a brief is given by a statute of the United States." This new language would be subject to research by the reporter on the statutory provisions. Without objection, it was so ordered.

Judge Maris objected to the first sentence of 36(a), feeling that the court should have some knowledge of the filing of the amicus brief. Mr. Stern and Judge Barnes felt that this provision was an aid to the court in helping the court decide whether to allow the amicus brief. If the parties consent, the court will probably allow it. Mr. Stern moved that the first sentence of 36(a) be stricken and that (b) be revised to provide that a motion is necessary for the filing of an amicus brief. The motion was not carried.

Judge Opper suggested that the reporter consider combining (a) and (b) into a single subdivision.

Mr. Stern moved that 36(c) be revised to read as follows:

"A motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons."

The motion was carried, and Rule 36 was approved as amended.

ITEM E. Preliminary Draft of Proposed Rule on Time for Taking Appeals.

Professor Ward stated that this draft followed the consensus of the committee at the May 1962 meeting that the procedures for appeals in civil, criminal, and bankruptcy cases be stated in the Appellate Rules, rather than merely referring to the appropriate Civil, Criminal, or Bankruptcy Rule. He stated that a separate subdivision in Rule 6 was given for bankruptcy cases since the proposal calls for a statutory amendment (unless the Supreme Court gets rule-making power in bankruptcy rules). He mentioned that Professor Currie has proposed the allowance of a flat 30 days for the notice of appeal by all parties, including the government, in civil cases. Since Professor Currie and Professor Ward now feel that there may be strong objection to this proposal by the government, Professor Ward has provided an exception allowing 60 days for the government and all parties in cases where the United States is a party, to file the notice to appeal in civil cases. [In anticipation of the merger of the civil and admiralty rules, admiralty cases are included under the heading of civil cases.]

Rule 6 . Time for Filing the Notice of Appeal.

Mr. Stern moved that the words "by any party" be inserted in the first sentence of the second paragraph of Rule 6(a), so that the sentence would read:

"The running of the time for filing a notice of appeal is terminated by a timely motion filed in the district court by any party pursuant to the . . ."

The motion was carried, and Rule 6(a) was approved as amended.

Professor Ward stated that subdivision (b) follows the statutory provisions in the Bankruptcy Act. He stated that it was his impression that in most cases the court of appeals does not want to consider the "under $500" category of bankruptcy cases unless they raise a question of general interest in bankruptcy administration.

After some discussion, Professor Ward summarized the views of the committee: The committee wanted to eliminate the provisions in Rule 6(b) which would qualify the 30-day period for filing the notice of appeal, in order to conform the bankruptcy practice as nearly as possible to the civil practice. This would leave untouched the distinction between proceedings in bankruptcy and controversies arising in proceedings in bankruptcy, and would allow cases involving amounts under $500 to be heard by the courts of appeals as permissive appeals.

Professor Ward asked if the committee would agree that all appeals in bankruptcy should be of right except those in compensation cases. This would require a statutory change, since it deals with a substantive, rather than a procedural matter. Judge Prettyman stated that if the Appellate Committee approved of this proposal, it would be recommended to the Bankruptcy Committee, which would seek its implementation. No formal action was taken on this proposal.

Mr. Stern felt that Rule 6(c) should be amended to provide that the entry of an order allowing the appeal should constitute the notice of appeal for purposes of starting the time running for preparation and transmission of the record. This practice is used in the Seventh Circuit, and the clerk of the court of appeals certifies the order to the clerk of the district court. He moved that this practice be followed for § 1292(b) cases and for permissive appeals in bankruptcy, and that Rules 6(c), 7 and 8 be amended accordingly. The motion was carried.

The committee next considered Rule 6(d) and Professor Barrett's proposed amendments to Criminal Rule 37(a)(2), relating to appeals in criminal cases. The proposed amendments to Rule 37(a)(2) were referred to the Appellate Committee without any consideration by the Criminal Rules Committee. The committee considered Professor Ward's summary of the amendments to 37(a)(2) as set out on pages 2-3 of Agenda Item E-2:

(1). A motion was made that the Appellate Committee recommend to the Criminal Committee that the second sentence of 37(a)(2) be revised to read:

> "If a timely motion for a new trial or in arrest of judgment has been made, an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion."

No action was taken on this motion.

Judge Friendly pointed out that in the case where a motion has to be made within 5 days, but the judge has granted an extension of time, the words "not later than 10 days after the entry of judgment" are inappropriate. Professor Moore suggested that in redrafting Rule 37(a)(2) the Reporter follow the language now in Civil Rule 73(a) and proposed Rule 6(a) with respect to the running of the time for appeal being tolled by a timely motion.

Judge Barnes moved that the Reporter be authorized to redraft this section on appeals in criminal cases keeping in mind the views of the committee and the problem raised by motions for new trial on the ground of newly discovered evidence. The Reporter's draft of Rule 6(d) will then be submitted to the Criminal Rules Committee with the suggestion that they adopt it as their Rule 37(a)(2). The motion was carried.

(2). This amendment was originally proposed by the Appellate Committee, and was approved.

(3). This amendment was originally proposed by the Appellate Committee, and was approved.

(4). The committee discussed the proposed amendment providing that the clerk "assist" the defendant in the preparation of an application for leave to appeal in forma pauperis. The committee differed as to whether this was a proper function of the clerk. Some members felt that counsel should be appointed to assist the defendant in this way. After a general discussion of problems related to in forma pauperis appeals, Judge Prettyman suggested that the Appellate Committee defer consideration of this subject, and request the Criminal Committee to defer consideration until such time as the Appellate Committee formulates general proposals on the subject of in forma pauperis. This suggestion was adopted by the committee.

(5). Professor Ward explained the proposed amendment allowing for an extension of time for filing a notice of appeal upon a showing of excusable neglect. He stated that Professor Barrett and Mr. Robert Erdahl, of the Department of Justice, felt that if the district judge advised the defendant in open court of his right to appeal, there should be no allowance for excusable neglect. The committee felt that some such provision was necessary, and Judge Prettyman suggested that the committee advise the Criminal Rules Committee that it adheres to its position on this matter that some provision should be made for excusable neglect.

Judge Friendly suggested that in redrafting the Reporter clarify the sentence in 6(d) containing this provision to show that it applies to the original 10 days in paragraph one as well as to the 10 days after the entry of the order.

Professor Barrett's proposed addition to Criminal Rule 49(c), as set out on page 9 of Agenda Item E-2, was approved by the committee.

The committee also approved the proposed addition to Criminal Rule 55, as set out on page 10 of Agenda Item E-2.

The committee next discussed the proposal contained in Agenda Item E-3 of allowing additional time for cross-appeals. Professor Ward stated that the Admiralty Committee and several members of the Civil Committee had expressed approval of this proposal. Judge Opper moved that the Appellate Committee approve the proposal in principle, and the motion was carried. Mr. Stern moved that the committee adopt the language on page 6 of Agenda Item E-3, substituting 7 days for 5:

> "If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within the time prescribed by this rule, whichever time is later."

The motion was carried.

ITEM F. Preliminary Draft of Proposed Rule on Costs

Rule 44. Costs.

Mr. Slade moved that the word "only" be inserted in the last sentence of 44(a) so that the phrase would read "costs shall be allowed only as ordered by the court." Without objection, it was so ordered.

Judge Friendly moved that subdivision (b) be amended to read:

> "No costs shall be allowed for or against the United States or an officer or agency thereof, except that costs may be allowed against the United States or an officer or agency thereof where specially authorized by statute and directed by the court, and whenever the United States or an officer or agency thereof is subject to costs, costs may be allowed in its favor."

Professor Ward stated that his original language was drafted to allow for the several statutory provisions allowing the United States to recover costs. In the light of such statutory provisions, Judge Friendly withdrew the motion and suggested that the Reporter clarify the language of this subdivision.

The committee approved Rule 44 with the exception of the redrafting of subdivision (b).

ITEM G. Consideration of Preliminary Drafts Tentatively Approved by the Committee Subject to Minor Changes in Form

Rule 1. Scope and Construction of Rules.

The Reporter suggested retaining sections (a) and (c) in Rule 1, and making subdivision (b) a separate rule. The committee voted to adopt this suggestion, and Rule 1 was approved with this amendment.

Rule 5. Appeal as of Right -- How Taken.

Mr. Stern suggested that the proviso in subdivision (c) be amended, by inserting the word "also", to read:

> ". . . provided that in criminal cases the clerk of the district court shall also serve a copy . . ."

This suggestion was adopted by the committee.

The committee discussed the suggestion of Judge Clark that copies of the notice of appeal need not be served on counsel for each party, but that the clerk be required to give a simple notification to the parties that the notice of appeal has been filed. Judge Maris agreed that this was a good suggestion. Judge Prettyman felt that the burden of notifying the parties by notices prepared by the clerk should not be added to the clerk's responsibilities. The committee unanimously voted to reject this suggestion of Judge Clark.

The committee considered the proposed insert to Rule 5(a) set out on page 3 of Agenda Item G-2. Mr. Stern moved to strike "by a defendant in a criminal case" from the insert. The motion was not carried.

Judge Miller moved that the insert be revised to read:

> "If a notice of appeal is filed in the court of appeals by a defendant in a criminal case or in proceedings under § 2254 or § 2255 of Title 28, U.S.C., or in habeas corpus proceedings, it shall be transmitted to the clerk of the district court and shall be considered to have been filed in that court on the date it was filed in the court of appeals."

The motion was carried, and Rule 5 was approved as amended.

Rule 7. Appeals by Permission under 28 U.S.C. § 1292(b).

Judge Friendly moved that a provision be added to Rule 7(a) to allow a court of appeals to require by rule or order additional copies of the application for permission to appeal under 28 U.S.C. § 1292(b). Without objection, it was so ordered.

In the third sentence of Rule 7(b) "5" days was changed to "7". Rule 7(c) will be redrafted by the Reporter to reflect the committee's decisions on Agenda Item E.

Rule 8. Appeals by Allowance in Bankruptcy Proceedings.

The new language in Rule 8(a) -- "a notice of appeal with the clerk of the district court and" -- was stricken in accordance with the committee action on Agenda Item E. In Rule 8(b) "5" days was changed to "7".

Judge Maris suggested that Rule 8(a) be revised to read:

> "If the appeal is allowed the appellant shall file the bond for costs as required by Rule 9 and shall cause the record to be transmitted to the court of appeals within 40 days after the date of the order of allowance."

The committee voted to adopt this suggestion, in accordance with its action on Rule 17.

Mr. Stern asked that the reporter consider the possibility of combining Rules 7 and 8, with the heading "Appeals by Permission". He felt that this was desirable since the committee was attempting to make the provisions of the two rules as similar as possible.

Rule 29. Filing and Service.

Judge Friendly inquired about the situation, in relation with the last sentence of Rule 29(a), where mail arrives at the clerks office late because the clerk's office is closed when it should have been open. It was the consensus of the committee that this problem would be substantially eliminated if the proposed Civil Rules amendment closing clerks' offices on Saturday is adopted. Rule 29 was approved as drafted.

Rule 30. Computation and Enlargement of Time.

Judge Friendly asked if some provision should be made in this rule for days which are holidays in the state where the court of appeals is held, but are not holidays in the state where the district court is held. Professor Ward explained that the rule was drafted to help the litigant, so that he would not have to include a day that his staff was not in his office. Since some members of the committee stated that courts of appeals sometimes observe state legal holidays, the reporter was requested to draft some appropriate language to cover this situation.

Mr. Stern moved that a provision be added to Rule 30(b) in substance as follows: The court may extend the time for extraordinary circumstances not foreseeable or controllable by a party or his counsel and then for not more than 7 days. An example would be a severe snowstorm. Judge Barnes agreed that there should be some flexibility in this rule. Professor Ward stated that this amendment would affect the consistent interpretation of the jurisdictional statutes. The motion was carried.

Rule 31. Motions.

In Rule 31(b) "5" days was changed to "7" days.

Judge Friendly raised the point that a problem arises under this rule of motions which are heard by a single judge. In that case, there would not be a need for a number of extra copies of the motion, etc. He stated that he agreed with Judge Clark that the formalistic procedure of Rule 31 is not necessary for motions which are heard by a single judge. He moved that the Reporter redraft Rule 31 to take account of this practice of motions being heard on short notice by a single judge and for other matters to be disposed of by the clerk, and to eliminate provisions as to numbers of copies, time, etc., which would be inconsistent with this type of procedure. The motion was carried.

ITEM B. Final Draft of Rule for Review of Decisions of the Tax Court of the United States

Judge Opper moved that the first two sentence of (a) be revised along the lines suggested by Judges Friendly and Murdock so that they would be combined into one sentence to read as follows:

> "Review of a decision of the Tax Court of the United States may be had as an appeal by filing a petition for review in the form of a notice of appeal with the clerk of the Tax Court within three months after the decision of the Tax Court is entered."

The motion was carried.

Judge Opper raised the problem of orders entered modifying a decision of the Tax Court, possibly without a motion. If the modification in effect constitutes a new decision, the time for appeal should begin to run again. But in the case of a minor typographical modification, there is a question whether the time should begin to run again. Judge Friendly felt that this could be taken care of within the Tax Court, and it was the consensus of the committee that the present language was sufficient.

The Reporter stated that the draft before the committee would have to be revised to reflect decisions of the committee on Rules 17 and 18.

Judge Opper moved that the first two sentences of (b) be revised as follows to conform to statutory language:

> "The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice delivered by mail is received by the clerk after the expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, . . ."

Without objection, it was so ordered.

Mr. Ash suggested that the language in subdivision (c), "shall designate the decision or part thereof appealed from" and the similar language in the form of the notice of appeal should be revised in view of the practice of the Tax Court of making findings of fact and opinion, and after the parties submit computations a decision is stated as a dollar amount. Judge Maris and Judge Prettyman urged that the form for the

notice of appeal be kept simple and brief.

Judge Opper moved that subdivision (c) be left as it is, and that an explanatory footnote be added to the form to explain what is meant by appealing only a "part" of the decision. The parenthetical expression in the Reporter's draft of the form would be eliminated. The motion was carried.

Judge Opper distributed a revised draft of subdivisions (e), (f) and (g) to reflect decisions made during the first day of the meeting with respect to district courts. Judge Barnes moved that a provision be added to this draft of (f)(1) to allow the court of appeals to extend the time for transmitting the record. Without objection, it was so ordered.

Judge Opper moved that the phrase "upon payment of the requisite charges" be inserted in his draft of (f)(1) since there are some charges in the tax court before the record is transmitted to the court of appeals. Without objection, it was so ordered.

Judge Prettyman stated that since the draft as it appears in Item B has been circulated to the bench and bar for comment, the committee should not make changes in phraseology, but only changes in substance. He felt that the draft should be kept as much as possible in the same form in which it was circulated to the public. The committee agreed.

Judge Opper moved that the provision which the committee recommended be inserted in the rule relating to civil cases with respect to the abbreviated record for the purpose of motions in the court of appeals be inserted in the Tax Court Rule. Without objection, it was so ordered. He further moved that the committee's language on docketing the appeal and filing the record which the committee adopted be inserted in the Tax Court Rule. The motion was carried.

The Tax Court Rule was approved as amended. Judge Maris stated that there would be no need to circulate the draft again to the bench and bar unless a great many substantive changes were made in the draft. He suggested keeping the draft "on the shelf" of the committee pending any further changes in the rules relating to civil cases. The committee agreed with Judge Maris' views.

ITEM X. Preliminary Consideration of Review and Enforcement of Agency Orders.

Judge Prettyman made a preliminary statement concerning the Judicial Review Committee of the Administrative Conference, of which he is chairman. This committee is completing a basic study which will be the foundation for an intensive study in connection with review of administrative orders. If the Administrative Conference is made a continuing body, the Judicial Review Committee will continue consideration of this subject. He stated that the work of the Appellate Rules Committee should be in coordination with that committee.

Professor Ward stated that since petitions for review are covered in the Appellate Rules, this committee has concurrent jurisdiction with the Administrative Conference committee as to them. The committee, after some discussion, instructed Professor Ward to proceed with his study of the uniform rule which relates to appeals in agency cases that lie in courts of appeals.

Professor Ward stated that the large remaining area of the committee's work is in the criminal field -- appeals in forma pauperis, appeals from bail orders, and custody of prisoners problems, for example.

Judge Maris suggested that the committee consider holding a three-day meeting when the reporter is ready with new material.

The meeting was adjourned at 4:15 p. m., subject to the call of the Chairman.

****