MINUTES OF THE NOVEMBER 1964 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES

The seventh meeting of the Advisory Committee on Appellate Rules convened in the Supreme Court Building on November 9, 1964 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, Jr.
Joseph O'Meara
Arnold Raum
Richard T. Rives
Simon E. Sobeloff
Robert L. Stern
Bernard J. Ward, Reporter

Mr. Samuel D. Slade was unable to attend the meeting because of illness.

The Chief Justice attended the Committee meeting briefly on the afternoon of November 10th.

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 Committee on Rules of Practice and Procedure, William E. Foley, Deputy Director of the Administrative Office, John F. Davis, Clerk of the Supreme Court of the United States, Professors Charles Alan Wright and James Wm. Moore, members of the standing Committee on Rules of Practice and Procedure, Joseph F. Spaniol, Jr., Attorney for the Administrative Office, and Mrs. Helen Benham, secretary to Judge Prettyman.

The Committee considered the comments on the draft of proposed uniform rules of Federal Appellate Procedure which have been received to date, and took the following action with respect to them.

RULE 2: SUSPENSION OF RULES

Comment 1 - Fifth Circuit Rules Committee

It was suggested that the term "court of appeals" needs specific definition to make clear whether it means all members of the court, a panel, or a single judge. Judge Maris noted that the statute defines the term and Judge Friendly felt that the Committee could not improve the rule by adding this definition to it. On motion of Dean O'Meara, the Committee voted to make no change in the draft rule.

RULE 3: APPEAL AS OF RIGHT - HOW TAKEN

(a) Filing the Notice of Appeal

Comments 1 and 2 - District Judges Bowen and Stephenson

Objection was made to the language of the proposed rule with reference to the presentation of a notice of appeal in a criminal case to a district judge rather than to the clerk. Upon consideration, the Committee voted to delete from the rules, the phrase "or to a judge of the court of appeals or to a judge of the district court" appearing in lines 15 and 16 on page 3 of the printed draft.

The Committee directed that the Advisory Committee's Note to this rule include reference to the Supreme Court cases on the timeliness of the filing of a notice of appeal.

(c) Content of the Notice of Appeal

Comments 1, 2 and 3 - Judge Friendly, Professor Wright, and the Fifth Circuit Rules Committee

The Committee considered the suggestion that a motion for leave to appeal in forma pauperis in a civil case be treated as embodying a notice of appeal. Such a provision in regard to criminal appeals is contained in Rule 4(d). On motion of Mr. Stern, the Committee voted to make no change in Rule 3(c), but instead to make an appropriate change in Rule 4(d) to include civil as well as criminal cases.

(d) Service of the Notice of Appeal

Comments 1, 2 and 3 - Professor Wright, Fifth Circuit Rules Committee, and Mr. Stern

It was suggested that there be deleted from the rule the requirement that an appellant furnish a sufficient number of copies of the notice of appeal to enable the clerk to send a copy to each party. On motion of Judge Friendly, the Committee adopted Mr. Stern's suggestion that lines 56 to 60 on page 4 of the printed draft be deleted and that there be inserted in the suggested form of the Notice of Appeal the following language:

> "The appellant is requested to provide the clerk with two copies of the notice of appeal plus one additional copy for each party who must be served."

The Fifth Circuit Rules Committee also felt that some specific time limit should be fixed in which the appellant must see to it that the appeal is docketed. Mr. Stern stated that this was a statistical matter and he could see no need for such a requirement. The Committee, thereupon, voted to make no further change in the draft rule.

RULE 4: TIME FOR FILING THE NOTICE OF APPEAL

(a) Appeals in Civil Cases Generally

Comment 1 - Mr. Barns

The suggestion was that the language of Rule 4(a) be clarified to show that a notice of appeal filed prior to the formal "entry of judgment" is to be considered timely. Since the language contained in this rule is the same as that contained in the civil rule, the Committee voted to pass over the suggestion.

Comment 2 - Professor Wright

It was suggested that the Committee undertake in the rules to clarify the "hopeless confusion" resulting from recent decisions interpreting "excusable neglect" and the problem that arises when a district court entertains an untimely motion. On motion of Judge Miller, the Committee directed that the language of the second paragraph of Rule 4(a) be retained as written and that the suggestion be made to the Civil Rules Committee that they include in the civil rules a provision indicating that the time for filing an appeal shall not be extended by an untimely motion to file an appeal.

Comment 3 - Judge Friendly

The suggestion that the seven day period within which any other party may file a notice of appeal be extended to ten days was considered. The Committee, after discussion, directed that the seven day period mentioned in line 12 of Rule 4(a) be changed to 14 days.

Comments 4 and 6 - Judge Koelsch and Mr. Stern

It was suggested that the rule provide that an extension of time may be sought before or after the expiration of the time for the filing of the notice of appeal where there is a showing of "excusable neglect." It was also suggested that the allowance of an appeal upon a showing of excusable neglect not be complicated by formal requirements of a motion and a hearing. After full consideration, the Committee voted to amend lines 37 to 42 of Rule 4(a) to read as follows:

> "Upon a showing of excusable neglect, the district court may, before or after the time has expired, with or without a motion and notice, extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days from the expiration of the original time prescribed by this subdivision."

Comment 5 - Judge Friendly

The Committee considered at some length the problem that might be raised by motions to reconsider a motion either when it is not entertained by the court or when it is entertained by the court and an amendment or alteration of a judgment results. Professor Wright suggested that there may be a more basic question - perhaps for consideration by the Civil Rules Committee - as to whether such a motion for consideration should be permitted. On motion of Judge Friendly, the Committee directed that the matter be given further consideration by the Reporter and that he be authorized to communicate with the Reporter of the Civil Rules Committee with respect to it.

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

Comment 1 - Mrs. Creskoff

It was suggested that the filing of the notice of appeal in the district court be required in cases where an interlocutory appeal is allowed by the court of appeals. Professor Ward stated that the Committee had discussed

this earlier and had decided that the notice of appeal in the cases perform no useful function. On motion of Mr. Stern, the Committee voted to leave this rule as drafted.

(d) Appeals in Criminal Cases

As noted above in the consideration of Rule 3(c), Comment 1, the Committee directed that lines 74 to 80 in Rule 4(d) on page 7 be changed so that the filing of a motion for leave to appeal in forma pauperis in a civil case will also be treated as a notice of appeal.

Comment 1 - Judge Friendly

It was suggested that the rule should reflect the result of the Supreme Court decision in the Healy case holding that a timely motion for rehearing interrupts the time for appeal and also that the rule be consistent with proposed F. R. Cr. P. Rule 32(c)(2). Judge Friendly so moved but added whether this should be done by an amendment to Rule 4(d) or by some other general provision should be left to the Reporter. This motion was approved by the Committee.

Comment 2 - Mr. Field

The rule as drafted refers to a motion for a new trial "made within 10 days after entry of the judgment." It was pointed out that a problem arises where the motion is made after trial and before the imposition of sentence, but decision on the motion is delayed until some time after sentence is imposed. It was also pointed out that the same ambiguity arises from use of the word "within" in Rule 37(a)(2), F. R. Cr. P. Judges Barnes and Friendly could not remember a situation described by Mr. Field as ever arising. However, Judge Friendly could see no harm in adopting the proposal that line 85 be amended to read "if the motion is made either before entry of the judgment or within 10 days thereafter." On his motion, the Committee tentatively approved the proposal, reserving to the Reporter the right to come back at the next meeting with any adverse views.

RULE 5: APPEALS BY PERMISSION UNDER 28 U. S. C. §1292(b)

(a) Application for Permission to Appeal

Comment 1 - Mr. Fins

Professor Ward agreed with Mr. Fins that the use of the words "application" and "petition" should be consistent throughout Rules 5 and 6.

Mr. Fins also suggested that the following be added to the end of Rule 5(c):

"No notice of appeal need be filed."

Professor Ward pointed out that this language also appears in Rule 4(c). On motion of Judge Barnes, the Committee directed the substitution of the word "application" for "petition" in Rules 5 and 6 and the inclusion of the language suggested by Mr. Fins in this rule as well as in Rule 4(c).

Comment 2 - Judges Matthes and Oliver

There have been decisions in four circuits on the effect as to the time for appeal of an amendment of a district court order adding a statement that the decision presents a substantial question. Three out of four circuits before which this question has arisen have allowed the district court to amend an order by adding such a statement. On motion of Judge Rives, the Reporter was directed to draw an amendment permitting an appeal to be filed after such an amendment and to submit it to the Committee at its next meeting.

RULE 7: BOND FOR COSTS ON APPEAL IN CIVIL CASES

Comment 1 - Judge Aldrich

It was pointed out that the rule, as drafted, may not exempt every appellant, who is not liable for costs, from filing a bond for costs on appeal. Professor Ward suggested that a sentence could be inserted in this rule to clear up this problem and that the Advisory Committee's Note could explain why this sentence was inserted. The Committee thereupon approved the insertion in the rule of a sentence reading as follows:

"A bond on appeal is not required of a party who is not subject to costs."

Comment 2 - Mr. Robinson

The Committee voted to postpone consideration of any suggestion for an increase in the amount of a bond on appeal until all comments had been received.

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

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

Comment 1 - Mr. Fins

It was pointed out that the words "motion" and "application" are used interchangeably in Rules 8 and 9 and should be changed to be uniform throughout these rules. Professor Ward agreed with Mr. Fins' point and suggested that the word "application" in lines 25 and 27 on pages 17 and 18 be changed to "motion," but that in lines 3, 13, and 15 no change should be made since these rules do not purport to prescribe the manner of applying for relief in the district court. The suggestion was adopted by the Committee.

Comment 2 - Reporter

The language on page 17, line 10, "After a notice of appeal is filed . . . ." seems to the Reporter to restrict the power of the court of appeals to grant stays and other relief pending appeal to those cases in which a notice of appeal has been filed. He felt that this provision is unnecessarily restrictive and that there may be emergency situations where there isn't time to file an appeal. He suggested that this language be deleted. Judge Friendly pointed out that this is exactly the same problem that arises in Rule 9 with reference to bail. On motion of Judge Sobeloff, the Reporter's suggestion was adopted.

RULE 9: BAIL

(a) Application for Bail After Appeal is Taken from Judgment of Conviction

On motion of Mr. Stern, the Committee directed that the word "application" appearing in lines 11 and 14 on page 20 be changed to "motion."

Comment 1 - Mr. Davis

Mr. Davis inquired whether Rule 9 was intended to supersede F. R. Cr. P. 46(a)(2). Professor Ward explained that it was not. The Committee thereupon passed over this comment without further action.

Comment 2 - Mr. Stern

Pointing out that the court does not know what the applicant considers himself entitled to apart from his request, Mr. Stern suggested that lines 18 and 19 on page 20 should be changed from "to which the applicant considers himself entitled" to "which the applicant has requested." The Committee approved this change.

It was also pointed out that while the rule requires reasonable notice of the application be given to the appellee, no provision is made as to the time for an answer. Judge Friendly felt that since courts deal with motions very summarily (and that usually this is the desire of both parties), it would be a mistake to spell out provisions on time to answer. In view of this, and after further discussion, the Committee voted to pass this portion of Mr. Stern's suggestion.

RULE 10: THE RECORD ON APPEAL

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered

Comment 1 - Mr. Robinson

It was suggested the word "immediately" at the end of paragraph (b) be made more definite by inserting "10 days" or some other specific limitation. Professor Ward did not agree. On motion of Mr. Stern, the Committee voted to make no change.

Comment 2 - Mr. Stern

Pursuant to the suggestion that the appellee be required to serve his designation of additional record on the appellant, the Committee directed that the following be inserted in line 24 on page 22 of the printed draft:

> "file and serve on appellant a designation of the additional parts to be included and".

(c) Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable

Comment 1 - Mr. Stern

The Committee discussed the proposed Illinois rule which contains a provision relating to "holding hearings if necessary" for purposes of reconstructing the record. Judge Friendly felt that this should be left to the discretion of the judge to decide whether holding hearings is necessary, and that he has the power to do so. After further discussion, Mr. Stern withdrew the suggestion.

RULE 11: TRANSMISSION OF THE RECORD

Comment 1 - Mr. Stern

It was suggested that the record on appeal be retained in the district court until the time when it is needed in the court of appeals so that the parties may have ready access to it. In the discussion, it was pointed out that some courts need the transcript only a day or two before argument, but that in other circuits as much as 30 days may be needed.

The Committee thereupon directed that subsections (d) and (e) of this rule be recast to make clear that the record will be transmitted at the regular time except that by stipulation of the parties or by order granted at the request of one party, the record may be retained in the district court for a period not to exceed 60 days. If the record is held in the district court, the clerk of the district court must transmit to the clerk of the court of appeals a certificate reciting the stipulation or order that the record be retained pursuant to this rule; that the record is ready for transmission; and that a list of docket entries is enclosed. The time for filing briefs is to run from the date of the filing of the certificate in the same manner as it ordinarily would run from the filing of the record.

(a) Time for Transmission

Comment 1 - Judge Friendly

Upon the suggestion of Judge Friendly, the words "and exhibits" were inserted after the word "transcript" in line 3 on page 25.

(b) Duty of Clerk to Transmit the Record

Comment 1 - Fifth Circuit Rules Committee

It was suggested that the clerk of the district court number the pages of record serially. Judge Rives explained that several members of the Fifth Circuit Rules Committee thought the record should be numbered straight through, but Judge Rives did not think it was necessary. It was the consensus of the Committee that the pages of each separate document are already numbered and that this was sufficient.

Comment 2 - Justice Whittaker

It was suggested that the draft rule be clarified to indicate that transmission of the record on the 40th day is timely. It was the consensus of the Committee that the present terminology of the proposed amendment is clear and that no change is necessary.

RULE 12: DOCKETING THE APPEAL; FILING OF THE RECORD

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

Comment 1 - Judge Friendly

The comment of Judge Friendly that seven days' notice is inadequate in the case of confined criminals was considered. The Committee voted to change this to fourteen days.

RULE 13: REVIEW OF DECISIONS OF THE TAX COURT

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

Comments 1 and 2 - Fifth Circuit Rules Committee

The Fifth Circuit Rules Committee suggested the addition of a statement, similar to that in Rule 3(a), that failure of the appellant to take any step, other than the timely filing of a notice of appeal, does not affect the validity of the appeal. The Committee thereupon approved the wording of the Reporter that "The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3."

It was also noted that while Form 2 (Appendix of Forms, p. 95) states the parties to be "Petitioner" versus "Commissioner," it is not clear whether any name appears in the proceedings below other than that of the taxpayer. Judge Raum stated that for reportorial purposes in the Tax Court the opinion is generally headed simply with the taxpayer's name and the record does have it as set forth on page 95 of the proposed rules. The Committee thereupon passed over the comment.

(d) The Record on Appeal; Transmission of the Record; Filing of the Record

Comment 1 - Mr. Fins

It was suggested that the last sentence of subsection (d) required clarification. On motion of Judge Rives, and after full discussion, the sentence was amended to read as follows:

> "Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken."

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

Comment 1 - Mr. Davis

Mr. Davis suggested that all parties to the proceedings before the administrative agency be made parties in the court of appeals. It was the consensus of the Committee that the rule needed no further clarification. The suggestion was thereupon withdrawn.

RULE 17: FILING OF THE RECORD

(c) Stipulation that Record not be Filed

Comment 1 - Mr. Stern

The Committee considered the suggestion that it be expressly provided that the court may order the record at any time. It was the consensus of the Committee that subsections (b) and (c) of Rule 17 should be reworked by the Reporter and that the rule might be changed so that the content would be presented in a better order.

At this point, Judge Prettyman suggested that a letter be circulated to the Committee members asking whether to include provisions with respect to "stays." The Reporter was requested to see what is needed and to report at the next meeting.

RULE 20: WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO A JUDGE OR JUDGES AND OTHER EXTRAORDINARY WRITS

(b) Denial; Order Directing Answer

Comment 1 - Judge Friendly

The suggestion of Judge Friendly that the district judge be relieved of the burden of writing a letter was withdrawn.

(c) Extraordinary Writs Other Than Mandamus and Prohibition Directed to a Judge or Judges

Comment 1 - Judge Friendly

Subsection (c) of this rule was discussed and the Committee directed the title should be changed to read "Other Extraordinary Writs." The Committee further directed that the first sentence should be changed to read as follows:

> "An application for extraordinary writs other than those named in paragraph (a) above shall be made by petition filed with the clerk of the court of appeals with proof of service on all necessary parties."

RULE 21: HABEAS CORPUS PROCEEDINGS

(a) Application for the Original Writ

Comment 1 - Mr. Meador

It was suggested that the first sentence be amended to read, "An application for a writ of habeas corpus shall be made to the district court for the district in which the applicant is in custody or to the district court in any other appropriate district." On motion of Judge Rives, the Committee adopted the following language suggested by the Reporter:

> "An application for a writ of habeas corpus shall be made to the appropriate district court."

(b) Necessity of Certificate of Probable Cause for Appeal

Comment 1 - Mr. Walsh

The suggestion with reference to this rule was discussed in conjunction with Rule 24. See below.

RULE 22: CUSTODY OF PRISONERS IN HABEAS CORPUS PROCEEDINGS

(a) Refusal of Writ or Rule to Show Cause

Comments 1 and 2 - Fifth Circuit Rules Committee and Mr. Stern

The Fifth Circuit Rules Committee suggested that ambiguity arises from the technical terminology of the rule, the use of such phrases as "reviewing of writ" or "reviewing of rule" as distinguished from "discharging a writ" or "discharging a rule," and the looseness of the term, "appropriate custody." On motion of Judge Rives, the Reporter's proposed new language with some modification was substituted for subdivision (a) and (b) of the rule. It reads as follows:

> (a) Failure or Refusal to Release the Prisoner
> Pending review of a decision failing or refusing to release a prisoner in a habeas corpus proceeding, the initial custody of the prisoner shall not be disturbed except by order of the court in which the proceeding is pending, or of a judge or justice thereof; but the prisoner may be detained in any appropriate custody, or enlarged upon recognizance with or without surety, as to the court or to a judge or justice thereof may appear fitting in the circumstances of the particular case. A person having custody of the prisoner may obtain an order for his removal upon a showing that custodial considerations require removal, but the order shall make any necessary provision for a successor custodian so that the case will not become moot.

Subsection (c) of the draft rule was relettered subsection (b) and a similar change was made in all other subsections. Judge Rives suggested, and the Committee approved, a change in the title of the new subdivision (b) and of the first two lines thereof as follows:

> (b) Release of the Prisoner. "Pending review of a decision releasing a prisoner on . . . ."

RULE 23: APPEALS IN FORMA PAUPERIS - GENERAL PROVISIONS

Comment 1 - Professor Wright

It was suggested that a separate motion for leave to appeal in forma pauperis and a new supporting affidavit is unnecessary and that the procedure for the further screening of appeals is cumbersome. On motion of Judge Rives, the Committee voted to follow the practice in the Sixth Circuit which authorizes a party to proceed on appeal in forma pauperis without additional leave, if he has been initially granted such leave "in a cause in the district court," This action requires a change by the Reporter in Rule 23 and Rule 24, Appeals in Forma Pauperis in Criminal Cases.

On motion of Judge Jameson, the Committee voted to retain the provisions in Rules 23 and 24 with reference to "frivolous" appeals.

(c) Form of Briefs, Appendices and Other Papers

Comment 1 - Fifth Circuit Rules Committee

It was suggested that where an appeal in forma pauperis is allowed it should automatically be heard on the original record without an appendix, thus eliminating the necessity for a motion. Judge Friendly thought this would encourage people to omit an appendix which they might otherwise include. The Committee voted to retain the present language of Rule 23(c).

RULE 24: APPEALS IN FORMA PAUPERIS IN CRIMINAL CASES

Comment 1 - Judge Prettyman

Judge Prettyman pointed out that the rule, as drafted, seems to require the district court to assign counsel to represent indigent defendants on appeal. He thought that the circuits should write their own rules with respect to appointing counsel for indigent defendants and furthermore that the Committee should re-examine this rule in the light of the new Criminal Justice Act and plans formulated under it.

Comment 2 - Mr. Stern

The reference in line 8 should be to Rule 23 rather than to Rule 36. This typographical error will be corrected.

RULE 27: MOTIONS

Comment 1 - Judge Friendly

Judge Friendly's suggestion that the two sentences in lines 9 to 13 of the rule be combined, was withdrawn.

Judge Friendly pointed out, however, that the last sentence does not include any reference to responsive papers. On his motion, the Committee directed that the last two sentences in the rule be combined to read as follows:

> "Motions, supporting papers and any response thereto may be typewritten and an original and three copies shall be filed."

Comment 2 - Mr. Robinson

Judge Friendly suggested that a determination as to which motions should be submitted on written documents and which motions should be presented by oral argument should be left to the individual circuits and not contained in these rules, as suggested. The Committee agreed and took no action on the proposal.

RULE 28: BRIEFS

(a) Brief of the Appellant

Comment 1 - Professor Wright

The Committee discussed at length the two points made by Professor Wright (1) that it is "odd draftmanship" to place an example "statement of the case" in the rule and (2) that the rule is unclear as to the location of the statement of facts in the brief. Dean O'Meara pointed out that revision in the fashion being discussed by the Committee could be endless and moved that the rule remain as drafted. The motion was approved by the Committee.

(b) Brief of the Appellee

Comment 1 - Mr. Walsh

It was suggested that the rule require the parties by themselves to agree more precisely on the issues. On motion of Judge Miller, the suggestion was disapproved.

(c) Reply Brief

Comments 1 and 2 - Professor Wright and the Fifth Circuit Rules Committee

It was suggested that the second sentence of this subdivision was unclear. Professor Wright further suggested the adoption of the language in Rule 17(e) of the Seventh Circuit. The Committee thereupon directed that the second sentence be amended to read as follows:

> "The reply brief shall present only matter in reply to questions discussed in appellee's brief."

(d) References in Briefs to Parties

Comment 1 - Professor Wright

Professor Wright inquired whether references to "plaintiff" and "defendant" are formal designations which are to be avoided under the rule. The Committee considered the suggestion of the Reporter that Rule 10(9) of the Fourth Circuit be adopted. The language is as follows:

> "Counsel will be expected, in their briefs and oral argument to keep at a minimum references to the parties by their formal designation appearing in the caption of the case, as appellants and appellees, or petitioners or respondents, as the case may be. Ordinarily, it is preferable to identify them as plaintiff or defendant, as in the proceeding below. It will avoid confusion in the argument and study of the case, and the necessity for back-references, if the parties are not repeatedly called "petitioner," "respondent," "appellant," "libellant," "cross-appellee," etc. It promotes clarity to use names of descriptive terms such as "the bus," "the employee," "the injured person," "the driver," "the pedestrian," "the taxpayer," "the ship," "the stevedore," etc.

Judge Prettyman felt that the second sentence of the Fourth Circuit Rule was confusing and should be taken out. The Committee, however, voted to leave in this sentence and adopt the language in place of the print.

(e) References in Briefs to the Record

Comment 1 - Fifth Circuit Rules Committee

This rule was discussed in conjunction with the Fifth Circuit Rules Committee's suggestion on Rule 11(b), Comment 1. No change in the rule was authorized.

(g) Length of Briefs

Comment 1 - Professor Wright

Judge Friendly agreed with Professor Wright that a limitation should be placed on reply briefs and that they should not be as long as briefs in chief. The Committee instructed the Reporter to formulate a consensus of the proper size of a reply brief from the rules of the various circuits and to prepare an amendment to the rule in accordance therewith.

RULE 29: BRIEF OF AN AMICUS CURIAE

Comments 1 and 2 - Fifth Circuit Rules Committee and Professor Wright

The Committee voted to adopt the suggestion that the rule be amended to permit the filing of the proposed brief amicus curiae with the motion for leave to file.

Comment 3 - Mr. Walsh

On motion of Judge Friendly, the Committee voted to take no action on the suggestion that the limitation that an oral argument by an amicus curiae will be allowed "only for extraordinary reasons" unnecessarily seeks to control an essentially discretionary matter.

RULE 30: THE APPENDIX TO THE BRIEFS

Comments 1 and 2 - Fifth Circuit Rules Committee and Professor Wright

It was suggested that the practice followed in the Second, Third, Sixth, and Seventh Circuits by which the parties, at their option, may file either separate appendices or a joint appendix, be adopted in this rule. The Committee discussed generally the use of a joint appendix and

the filing of the briefs prior to the preparation of the appendix. On motion of Dean O'Meara, the Committee voted unanimously to retain the language of the rule relating to the filing of a joint appendix and to provide for the postponement of its filing until the briefs are in.

On motion of Mr. Stern, the Committee directed that the rule be amended to add a provision permitting the parties to stipulate what is to go into the joint appendix.

Comment 3 - Mr. Fins

It was suggested that the printed record or appendix should contain only factual matters upon which there was disagreement in the briefs. Judge Prettyman suggested that the Reporter develop appropriate language to be inserted in Rule 30(b) permitting the parties to stipulate that certain parts of the record not be printed.

Comment 4 - Mr. Chapman

It was suggested that Rule 30(b) may be interpreted to require the filing of two briefs by each party. Judge Prettyman observed that the author of the suggestion did not read the rules in their correct light.

Comments 5 and 6 - Mr. Bagley and Mr. Robinson

The Committee took no action on these comments relating to the late filing of the appendix.

Comment 7 - Judge Friendly

Judge Friendly brought to the attention of the Committee the not infrequent problem of the court in piecing together several appendices to arrive at a usable reproduction. No action by the Committee was requested.

Professor Wright suggested that the sentence appearing in lines 20 to 25 was important enough to require a separate paragraph heading. The Committee thereupon directed that a separate paragraph with an appropriate heading be made and that the other paragraphs in the rule be relettered as appropriate.

Comment 8 - Mr. Stern

It was suggested that the term "Excerpts from the Record" was more appropriate than the term "Appendix." Judge Prettyman stated

that if we say "Excerpts from the Record," we would make it clear that we do not mean the whole appendix. Professor Ward, however, felt that the appendix should be called "Record." The Committee considered the proposal but voted to make no change.

On motion of Mr. Stern, the Committee directed that line 38 be amended by inserting after the word "and" the phrase "upon notice to the appellee."

Comment (a)-1 - Judge O'Sullivan

On motion of Mr. Stern, the Committee decided to pass over the suggestion of Judge O'Sullivan that the last sentence of the first paragraph of subdivision (a) of Rule 30 be deleted.

RULE 31: FILING AND SERVICE OF BRIEFS AND THE APPENDIX

(a) Time for Filing Briefs

Comment 1 - Mr. Hunter

On motion of Judge Friendly, the Committee passed over the suggestion that the brief of the appellee be due thirty days after the time has expired for the filing of the appellant's brief rather than within thirty days after it is actually filed.

(b) Time for Filing the Appendix

Comment 1 - Mr. Fins

The Committee agreed with the suggestion that 14 days for the appellant to prepare, print, serve and file his appendix is too short. On motion of Judge Barnes, the rule was amended to permit the filing of the appendix in 21 days rather than 14 days.

Judge Rives inquired whether a corresponding change should not be made in subdivision (a), but the Committee felt that the reply brief was short enough to be ready in 14 days. The Committee considered this proposal but decided to retain the 14 day period for filing a reply brief.

(c) Number of Copies to be Filed and Served

Comment 1 - Mr. Walsh

The suggestion that there is no need for more than one typewritten copy of the record was discussed by the Committee and rejected. The Committee also considered the need for 25 copies of each brief and appendix and decided that no change should be made in the draft rule.

(d) Consequence of Failure to File Briefs or Appendix

Comment 1 - Judge Friendly

The suggestion of an editorial change in this rule was withdrawn.

RULE 32: FORM OF BRIEFS, THE APPENDIX, MOTIONS AND OTHER PAPERS

Comment 1 - Mr. Stern

It was agreed that the words "capable of producing" in lines 4 and 5 of the printed draft were inappropriate. Mr. Stern had suggested that the words "which provides" should be inserted in place of "capable of producing" but the Committee decided that it should be changed to "which produces."

(a) Form of Briefs and Appendices

Comment 1 - Fifth Circuit Rules Committee

The Committee considered the suggestion that different colors for different kinds of appellate documents were unnecessary and voted to make no change in the printed draft.

Comment 2 - Judge Friendly

Judge Friendly commented that perhaps it would have been well to reserve gray for the use of the Government, but the Committee took no action on this proposal.

RULE 33: PREHEARING CONFERENCE

Comment 1 - Mr. Fins

Mr. Fins suggested that this rule is out of order chronologically with respect to the other rules, because the Prehearing Conference should be held before the parties file their briefs and the appendix. The Committee, after discussion, decided to make no change in the draft rule.

RULE 34: ORAL ARGUMENT

(e) Non-Appearance of Counsel; Failure to File Briefs

Comment 1 - Judge Johnsen

The Committee decided to pass over the suggestion that the last sentence of Rule 34(e) be deleted and that the question of what to do in the event that counsel do not appear be left to the discretion of the court.

RULE 35: DETERMINATION OF CAUSES BY THE COURT IN BANC

Comments 1 and 2 - Fifth Circuit Rules Committee and Judge Chambers

It was suggested that the circulation of a petition for rehearing in banc be restricted to those cases where the decision is by two judges only, or on the suggestion of another judge. It was also suggested that the present language of the rule may require a vote by each judge on every petition for rehearing in banc. Judge Chamber's letter suggests that line 14 of the rule carries the implication that if these suggestions are "transmitted," the judge who is the transmittee is required to consider them and to do something about them. The Committee, after full discussion, decided to make no change in the rule, but instructed the Reporter to expand the note to indicate that no judge is obligated to vote on any petition for a rehearing in banc.

Comment 3 - Judge Friendly

The suggestion that the second sentence of the rule be recast in the light of the statute authorizing a retired judge to participate in a rehearing in banc of a decision in which he participated was withdrawn by Judge Friendly.

Comment 4 - Professor Ward

The Reporter suggested that the last sentence in the rule might be unclear in certain respects. Judge Friendly stated that the rule was drafted in this way so that the petitions for rehearing in banc would be filed promptly. He thought this could be accomplished by saying that the suggestion must be made within the time for filing a petition for rehearing. Then the petitioner has the choice of suggesting a rehearing by the panel, in the alternative a rehearing in banc, or he can merely suggest a rehearing in banc. He can do any of these three, but has to do them within 30 days. Judge Friendly, thereupon, moved to change the language in lines 18 to 20 to read as follows:

> ". . . the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing whether in such a petition or otherwise. The pendency of such a suggestion shall not affect the finality of the judgment."

Judge Friendly explained that this proposed language is entirely consistent with Rule 41, which provides for staying of the mandate only by the filing of a petition for rehearing and doesn't say a word about the suggestion. The Committee voted to insert this language in the draft rule.

RULE 36: ENTRY OF JUDGMENT

Comment 1 - Fifth Circuit Rules Committee

It was suggested that the rule be clarified to indicate when the clerk of the court is to enter judgment. In the discussion, it was mentioned that there is a variation in the manner in which judgments are entered by the various circuits. In some circuits the judgment is entered by the clerk upon receipt of the opinion and in the Fourth Circuit the judges sign the judgment. On motion of Judge Rives, the Committee adopted the suggestion of the Reporter that the word "upon" in lines 4, 8 and 11 be changed to "following" and that the following sentence suggested by the Reporter be inserted immediately after the present third sentence:

> "Unless otherwise directed by the court, the clerk shall not enter judgment until copies of the opinion or judgment are available for mailing to the parties."

RULE 39: COSTS

(c) Costs of Briefs and Appendices

Comment 1 - Judge Barnes

After approving an amendment to subdivision (d), as shown below, the Committee considered Judge Barnes' observation that the rule does not contain any provision with respect to when and to whom objections to costs are to be made. The Committee, after discussion, directed that the matter be placed on the agenda for further study at the next Committee meeting, including the problems that may arise from a supplemental mandate on costs. The Reporter was requested to give the matter his attention.

(d) Clerk to Insert Costs in Mandate

Comment 1 - Professor Wright

Professor Wright inquired as to what happens where the mandate is ordered to issue immediately and the costs have not been ascertained. The Committee discussed the possibility of a supplemental mandate covering the matter of costs and on motion of Judge Rives, approved the Reporter's suggestion that Rule 39(d) be changed by inserting "or in a supplement thereto" following the word "mandate" at the end of line 33 and by adding the following sentence to the rule:

> "Issuance of the mandate shall not be stayed for taxation of costs."

RULE 40: PETITION FOR REHEARING

Comment 1 - Fifth Circuit Rules Committee

It was suggested that the rule be amended to permit the petition for rehearing to be accompanied by a brief. On motion of Mr. Stern, the Committee directed that language be inserted in the rule which would indicate that the petition itself should contain whatever argument is desired without the need for an additional brief. The Reporter was requested to draft appropriate language to indicate what is to be contained in the petition.

Comment 2 - Mr. Fins

With regard to certain terminology in the draft rule it was pointed out that a party who opposes a petition files an "answer," not a "reply," (line 8), that the word "requested" in line 10 should be changed to "ordered," and that the phrase "a request," in line 12 should be changed to "an order." After discussion, the Committee decided that this should remain as drafted.

It was further suggested that the word "ordinarily" be deleted, so that the rule will be positive and the lawyer may be certain that no change in the decision will take place without an opportunity for him to be heard on the proposed change. The Committee decided that the word "ordinarily" should be left in as presently stated.

Judge Rives suggested that a separate paragraph be added to this rule to cover the problem of a petition for rehearing and on his motion the following wording was adopted:

> "If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument and resubmission or may make such other orders as deemed appropriate under the circumstances of the particular case."

RULE 42: VOLUNTARY DISMISSAL

Comment 1 - Mr. Fins

The Committee considered various suggestions for improving the language of the rule, but decided that it should remain as presently drafted.

Comment 2 - Judge Friendly

Judge Friendly's comment relating to the dismissal of an appeal by stipulation in the district court after docketing was withdrawn.

RULE 43: SUBSTITUTION OF PARTIES

(c) Public Officers; Death or Separation from Office

Comment 1 - Judge Friendly

It was suggested that the rule also be made to apply when the relator in a habeas corpus case is transferred from one warden to another. After brief discussion, Judge Friendly withdrew the suggestion.

RULE 44: CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE UNITED STATES IS NOT A PARTY

Comment 1 - Mr. Fins

It was suggested that line 1 of this rule be amended to read "It shall be the duty of a party or of his counsel" so as to include a case which is handled by a litigant pro se, without any counsel of record. This amendment was approved by the Committee.

RULE 46: ATTORNEYS

(b) Suspension or Disbarment

Comment 1 - Mr. Walsh

The Committee agreed with the observation that the rule, as drafted, is too stringent in the matter of an automatic suspension from practice, and that the courts should be given more discretion. The following language, suggested by Mr. Walsh, was approved as appropriate:

> ". . ., or has been guilty of conduct unbecoming a member of the bar of the court, the member will be notified that his suspension or disbarment in another court of record has been brought to the attention of the court and that he will be further suspended or disbarred from practice before the court unless he shows good cause tc the contrary within (blank) days thereafter."

The Committee further determined that 30 days be allowed in which to show good cause to the contrary.

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RECOMMENDED ADDITION TO RULES

Comment 1 - Judge Friendly

Judge Friendly suggested that there be incorporated in the Appellate Rules the requirement in Civil Rule 51 and in Criminal Rule 30, relating to the noting of an objection to the judge's charge to the jury; and the language contained in Civil Rule 52(a) and in Criminal Rule 52, relating to the clearly erroneous doctrine, harmless error, and plain error. Professor Moore agreed as did Professor Wright with the exception of one caveat. Professor Wright felt that if the Committee adopted into the plain error provision in Criminal Rule 52(b), it would be making a very substantial change in the practice for civil appeals. He pointed out that the Ninth Circuit has not adopted the plain error provision in civil cases. However, many circuits have said that they have some limited discretion in this regard in civil cases, but that this discretion is not the same as it is in criminal cases under Rule 52(b). They say merely that if there are errors so serious as to impair the integrity in the judicial process, then they should be remedied. After further discussion, the Reporter was requested tc look into the inclusion of these matters in some form in the Appellate Rules and present the Committee with a draft.

Comment 2 - Judge Friendly

Judge Friendly had suggested that special provisions be made covering cases where the district court has reviewed an administrative agency (social security, Board of Contract Appeals, some immigration cases), and that consideration be given to the new procedure devised by the Civil Division of the Department of Justice for Social Security cases. On motion of Judge Friendly, the Committee directed that the following sentence be added to Rule 30(d) - which has become Rule 30(e) as above amended:

> "The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision."

OTHER MATTERS

1. Cut-Off Date for Comments on the Rules

Judge Prettyman presented the request of Mr. Bernard Segal, President of the American College of Trial Lawyers, that the cut-off date for comments to the preliminary draft be extended from April 1 to May 1, 1965, to enable the American College of Trial Lawyers to complete a survey and then present its comments. Judge Maris stated that he thought it was in order to do this. On motion of Judge Barnes, the Committee approved the request and directed that Mr. Segal be so advised. Judge Maris added that comments received from any other interested parties before this date should also be considered.

2. Circulation of Approved Changes in the Draft

Judge Prettyman inquired what the Committee wanted to do about circulating the changes which were adopted at this meeting. Judge Maris stated he did not think any further circulation should be made at this time as the date published in the preliminary draft for the deadline date to receive comments was April 1, 1965. However, he indicated that it would be proper for any Committee member to discuss with any interested parties what the Committee proposes to do. He felt that the action of the Committee taken at this meeting is still subject to change and should not be considered as "final action" until all comments and suggestions are received. It was the consensus of the Committee that the changes adopted at this meeting may be communicated to interested parties, and should be communicated to the courts, but that it is to be made clear that these changes are tentative and subject to change by the Committee.

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All business having been completed, the meeting was adjourned at 3:20 p.m., November 10th.