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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

SUPREME COURT BUILDING

WASHINGTON, D. C. 20544

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September 2, 1967

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The Honorable Albert B. Maris, Chairman
Committee on Rules of Practice
and Procedure
5050 United States Courthouse
Philadelphia, Pennsylvania 19107

Dear Judge Maris:

I have received under date of August 29, 1967 a memorandum addressed to the Chairman, Reporter and Members of the Advisory Committee on Appellate Rules transmitting a copy of "the Committee report together with Judge Prettyman's letter of August 28, 1967, to Judge Maris regarding Rule 30." The enclosure is a complete set of Federal Rules of Appellate Procedure. I assume that that same set has been sent to the members of the Standing Committee. In the interest of clarifying matters, I should like to explain the exact origin of this most recent draft of Federal Rules of Appellate Procedure.

The final draft of proposed Uniform Rules of Federal Appellate Procedure was submitted by the Advisory Committee on Appellate Rules to the Standing Committee on Rules in August, 1966, and was considered by the Standing Committee at its meeting on September 7, 1966.

At that meeting the Standing Committee approved, with certain expressly directed modifications, all of the rules proposed by the Advisory Committee on Appellate Rules except proposed Rule 30 on Reproduction of Necessary Parts of the Record and proposed Rule 9 on Bail.

With respect to proposed Rule 30, the Standing Committee determined to circulate it among the bench and bar of the country as the proposal of the Advisory Committee on Appellate Rules along with two alternative drafts. Proposed Rule 9 was recommended to the Reporter of the Appellate Rules Committee for further study in the light of the then recently enacted Bail Reform Act.

The Advisory Committee on Appellate Rules understood the action of the Standing Committee to be a request that it

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(1) study the suggestions received in response to the circulation of the three drafts directed by the Standing Committee and make a final recommendation on a proposed rule on reproduction of necessary parts of the record in the light of that study; and (2) resubmit a proposed rule on release of prisoners in place of its proposed Rule 9 on Bail.

This it has done, and proposed Rule 9 on Release of Prisoners and proposed Rule 30 on Appendix to the Briefs constitute amendments to the final draft of proposed Uniform Rules of Federal Appellate Procedure originally submitted to the Standing Committee in August, 1966.

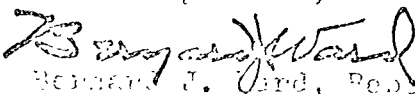
The Advisory Committee on Appellate Rules did not, however, feel free to restudy the modifications of its proposals that were directed by the Standing Committee at its meeting of September 7, 1966. Those modifications have been inserted in the set of Federal Rules of Appellate Procedure now being circulated, presumably to members of both Committees, but they do not form a part of the final recommendations of the Advisory Committee on Appellate Rules. They were inserted by the Reporter of that Committee on the instructions of the Standing Committee.

There is still another source of difference between the final recommendations of the Advisory Committee on Appellate Rules and the draft of Federal Rules of Appellate Procedure now being circulated. The Reporter of the Appellate Rules Committee assumed it to be his responsibility to both Committees to make such changes as seemed clearly necessary in the light of new legislation, court rules and decisions. With the exception of a change in Rule 23 on Custody of Prisoners in Habeas Corpus Proceedings to cause it to conform with the Supreme Court Rule adopted in June, 1967, such changes are confined to the Committee Notes. A single change results from an oversight (see Appendix, Rule 6).

There is set out in an appendix attached hereto a list of all changes from whatever source from the draft of Proposed Uniform Rules of Federal Appellate Practice submitted to the Standing Committee by the Advisory Committee on Appellate Rules in August, 1966.

With every best wish, I am,

Sincerely Yours,


Bernard J. Ard, Reporter
Appellate Rules Committee

APPENDIX

EXPLANATION OF DIFFERENCES BETWEEN DRAFT OF PROPOSED UNIFORM RULES OF FEDERAL APPELLATE PROCEDURE SUBMITTED BY ADVISORY COMMITTEE ON APPELLATE RULES TO THE COMMITTEE ON RULES IN AUGUST, 1966, AND DRAFT TO BE CONSIDERED BY COMMITTEE ON RULES AT ITS MEETING OF SEPTEMBER 12, 1967.

Rule 1. Scope of Rules

The first paragraph of the Note is new. It was added by the Reporter to indicate the Act of November 6, 1966, as the basic authority for the promulgation of the rules.

Rule 2. Suspension of Rules

The text of this rule has been changed precisely in accordance with the direction of the Committee on Rules. See Minutes of the September 1966 Meeting of the Committee on Rules of Practice and Procedure (hereafter, Min.) p. 2.

Rule 4. Appeal as of Right--When Taken.

The fifth sentence of Rule 4(b) is changed by substituting "government" for "United States." This change cures what appears to be an unintended textual variation. The sentence is taken from FRCP 37(a)(2), where "government" appears.

Rule 6. Appeals by Allowance in Bankruptcy Proceedings.

The text of Rule 6(a) has been changed to correct the Reporter's oversight. The Appellate Rules Committee recommended that the time for taking appeals in Bankruptcy be made the same as in civil cases generally. That recommendation was embodied in its draft of proposed Rule 4, and it was accepted by the Committee on Rules. The Appellate Rules Committee, at the time of making the above recommendation, instructed the Reporter to make any other necessary changes to cause the rules to be in harmony with the basic change.

That instruction involved a change in Rule 6(a) which the Reporter overlooked. Rule 6(a) as transmitted to the Standing Committee and approved by it provided that a petition for allowance should be filed with the clerk of the court of appeals "within the time provided by section 25 of the [Bankruptcy] Act." That provision was consistent with the case law, which required the petition to be filed within the time fixed by the Act for taking an appeal. But once the Appellate Rules Committee set out to change by rule the time fixed for taking

appeals in bankruptcy, adherence to the prior practice of allowing a petition for allowance to be filed at any time within the time fixed for taking an appeal of right required that Rule 6(a) be changed by substituting "within the time provided by Rule 4 for filing a notice of appeal" in place of "within the time provided by section 25 of the Act." This change has been belatedly made. The result seemed to require the addition of a final sentence to Rule 6(a): "A notice of appeal need not be filed." That sentence repeats the identical statement found as the last sentence of Rule 6(d), but the repetition seems functional.

The Note has been changed to direct attention to and to explain the change from present practice.

Rule 9. Release of Prisoners.

This rule is new. Rule 9 as originally proposed by the Appellate Rules Committee regulated review of bail orders. The Committee on Rules recommended it to the Reporter for study in the light of the Bail Reform Act of 1966. The Appellate Rules Committee offers this rule as an amendment to its original proposal.

Rule 11. Transmission of the Record.

The text of Rule 11(b) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 5.

Rule 12. Docketing the Appeal; Filing of the Record.

The text of Rule 12(a) has been changed in accordance with the direction of the Committee on Rules, Min., p. 5, and in accordance with the letter of its Chairman to the Reporter of October 25, 1966.

Rule 13. Review of Decisions of the Tax Court.

The text of Rule 13(a) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 13.

The Note has been changed in the light of the textual change and to identify the Act of November 6, 1966, as the authority for the promulgation of rules to regulate review of Tax Court decisions.

Rule 15. Review or Enforcement of Agency Orders--How Obtained; Intervention.

The text of Rule 15(a) has been changed in accordance with the direction of the Committee on Rules. See Min., p. ~~15.6~~

The Note has been changed in the light of the textual change and to identify the Act of November 6, 1966 as the authority for the promulgation of rules to regulate review of agency orders.

Rule 22. Habeas Corpus Proceedings.

The Text of Rule 22(a) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 7.

The second paragraph of the Note to Subdivision (a) is new. It is added in accordance with the direction of the Committee on Rules. Min., p. 7.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings.

Two changes have been made by the Reporter in this rule, both in the light of the promulgation by the Supreme Court on June 12, 1967 of a new rule on Custody of Prisoners in Habeas Corpus Proceedings (Supreme Court Rule 49). The Reporter assumed that the Committee on Rules would wish the changes made. He invites the careful consideration of the Committee to the changes.

The text has been changed by the addition of new subdivision (d).

The Note has been changed by striking it entirely and substituting "The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967.

The change in the text restores a subdivision initially recommended to the Supreme Court by the Appellate Rules Committee in response to a request from the Court made in 1965 that the Committee study its rule on custody of prisoners with a view to suggesting improvement. Between the time of its recommendation to the Court and that of its recommendation to the Committee on Rules, the Appellate Rules Committee decided to omit what is added subdivision (d).

The Appellate Rules Committee is firmly of the view that there can be no difference between courts of appeals and Supreme Court regulation of the subject. As the Reporter ex-

plained to the Committee on Rules, the Appellate Rules Committee offered a new rule on the subject only with the understanding that the Supreme Court would be advised of the difference between its proposed rule and former Supreme Court Rule 49 and of the necessity for either abrogating or amending the latter.

As noted, the Supreme Court has since amended its Rule 49 precisely along the lines recommended by the Appellate Rules Committee. But a complicating incident is that in the meantime the Appellate Rules Committee reconsidered its recommendation to the Court and decided to omit subdivision (d) as superfluous. So once again the two rules are not precisely in accord. The solution offered by the Reporter is to add subdivision (d). It may be that the subdivision is superfluous, but this will lead to fewer problems than will a conflict between the Supreme Court Rule and the Uniform Rule.

The reason for reducing the original, very detailed Note to a single sentence is that the purpose of the original Note was to explain the reasons why the proposed rule differed from then Supreme Court Rule 49. Since the Court has since changed its rule, there seems little point in criticizing its former rule. It is true that the original note provides an interesting "legislative history" for the Supreme Court Rule as well as this rule. But since the Court itself declines to provide that sort of history for its own rules, there may be an impropriety involved in this Committee's providing it.

Rule 27. Motions.

The text of Rule 27(c) has been changed precisely in accordance with the direction of the Committee on Rules. Min., pp. 8-9.

Rule 28. Briefs.

The text of Rule 28(d) has been changed in accordance with the direction of the Committee on Rules, Min., p. 9, and in accordance with the letter of its Chairman to the Reporter of October 25, 1966. (The comma inserted between "names" and "of parties" in the second sentence is a typographical error and should be omitted.)

The text of Rule 28(e) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 9.

Rule 30. Appendix to the Briefs.

This rule is new. It is submitted by the Advisory Committee on Appellate Rules as its final recommendation with respect to a rule on reproduction of parts of the record on appeal.

Rule 31. Filing and Service of Briefs and the Appendix.

The text of Rule 31(c) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 11. (It should be noted that if proposed Rule 30 is accepted, this rule must be revised to eliminate references to the appendix, since proposed Rule 30 itself fixes the time for filing and the number of copies of the appendix.)

Rule 32. Form of Briefs, the Appendix and Other Papers.

The text of Rule 32(a) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 11.

Rule 34. Oral Argument.

The text of Rule 34(b) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 11.

The note to Rule 34(b) has been changed to reflect the fact that a majority of circuits no longer allow 45 minutes of oral argument. Reduction of the time to 30 minutes by the Third Circuit in 1967 brings to seven the number of circuits which limit oral argument to 30 minutes in the ordinary case.

Rule 39. Costs.

Minor changes have been made in the notes to subdivisions (b), (c) and (e) to reflect changes in court rules and to add a relevant recent decision.

Rule 46. Attorneys.

The text of Rule 46(b) and of Rule 46(c) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 13.

Correction in Appellate Rule 9
Rule 30 (c) -

Rule 30 (f) "applicable to for all cases, or to file"
note to Rule 31
nothing re. subdivisions (b) and (c)

note to Rule 34

5th line "most many cases"

notice of the election by the appellant to
defer preparation of the appendix shall
be filed and served by him within 10
days after the date on which the record
is filed. "