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

The fifth meeting of the Advisory Committee on Appellate Rules convened in the Supreme Court Building on May 20, 1963, at 9:30 a.m. The following members were present during all or part of the session:

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

Mr. Willard W. Gatchell was unable to attend the meeting.

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

ITEM A. Adoption of Rules Previously Approved.

Judge Prettyman stated that this item consisted of drafts of rules which had been approved at previous meetings of the Committee without change or with minor changes, and are presented here for final approval by the Committee.

Rule 5. Appeal of Right -- How Taken.

Judge Rives suggested that the third sentence of Rule 5(c) be amended to read "The appellant is requested to furnish . . ." He did not favor the mandatory language of the rule as drafted. He felt that this change would be in accord with Judge Clark's suggestion of allowing the clerk to mail

postcard notices of the appeal to the parties. Judge Barnes and Mr. Slade spoke in favor of the present language of the draft. There was no second to Judge Rives' motion.

Mr. Stern moved that a provision be added to Rule 5(c) requiring the clerk to stamp or otherwise indicate the date of filing on each copy of the notice of appeal. The Committee voted to adopt this suggestion, and the Reporter was instructed to draft appropriate language.

Judge Friendly moved that the second sentence of Rule 5(b) be stricken. Professor Ward stated that he had had an expression from Professor Barrett that it was not a matter of great importance as far as the Criminal Rules Committee was concerned, and that Professor Ward concurred in this view. The Committee agreed that it was not necessary to require the notice of appeal in a criminal case to be more detailed and technical than the notice of appeal in a civil case. Judge Friendly's motion was carried.

Judge Opper moved that the first sentence of Rule 5(b) be amended so as to read in part "...shall designate the judgment, order, decision or part thereof appealed from;...". This change would enable a sentence to be dropped from the proposed Tax Court rule. The Committee voted in favor of this motion.

Judge Friendly suggested that the Reporter consider clarifying the provision in Rule 5(a) relating to the filing of notices of appeal in the court of appeals. He felt it should be made clear that a defendant could not file his notice of appeal in both the district court and the court of appeals and thereby take advantage of any additional time which would result from filing one appeal on a later date than the other. Mr. Slade suggested changing the first phrase of the third sentence of Rule 5(a) to read "If the notice of appeal is filed...". The Reporter was requested to make some clarifying change in the rule as drafted.

Rule 2. Suspension of Rules.

Judge Friendly stated that he felt Judge Clark's point, as stated in the Reporter's note to Rule 2, had merit, and moved that language be inserted in the second line of the draft to indicate that "a court of appeals may, except as provided in Rule 30(b), suspend . . .". Professor Ward stated that Rule 30(b) was the only statutory exception to the provisions of Rule 2. The motion was carried and the Reporter was instructed to work out the precise language of the rule.

Mr. Slade felt that there should be a specific mention in the Committee Note to Rule 2 that the inclusion of the reference to Rule 30(b) in Rule 2 was a reflection of the general provision of Rule 1(b). He felt that this would make it clear that the Appellate Rules do not alter any statutes. The Reporter was requested to consider this suggestion.

Rule 7. Appeals under 28 U.S.C. § 1292(b).
Rule 8. Appeals by Allowance in Bankruptcy.

Judge Friendly moved that in Rules 7(b) and 8(b) the provision for number of copies of the answer be amended to provide that an adverse party may file the same number of copies of the answer in opposition as are required for the application, and that the reporter draft appropriate language. The motion was carried.

Rule 34x. Form of Briefs, Appendices, Petitions, Motions and other Papers.

Judge Miller asked for some clarification of the provisions made in Rule 34x for printing. Professor Ward explained that the Committee had decided to be as liberal as possible in this rule to allow experimentation with new processes, but that the Committee did not want to permit ditto. After some discussion of various methods of duplicating, the Committee decided to retain the phrase "clear black image" as a goal for the parties to strive for. Since this is a permissive rule, an individual judge may allow something different than what is suggested in the rule. This follows the Committee's intention of flexibility in this area. Mr. Slade and Judge Miller suggested changing "capable of producing" to "which produces" in the first sentence of Rule 34x(a). No formal vote was taken on this suggestion.

Judge Rives moved that in Rule 34x(a), second sentence, the phrase "or a judge thereof" be added after "court". The motion was carried.

Judge Miller stated that he had several questions throughout the rules about what may be done by one judge and what must be done by a panel or the whole court of appeals. It was the consensus of the Committee, after discussion, that this question may best be left to the individual courts of appeals to decide in the light of their particular situations. The Committee deferred discussion of this question to the consideration of the rule respecting motions.

Judge Friendly raised the question whether the Appellate Rules should provide in some appropriate place that courts fo appeals may make local rules not inconsistent with these rules. There was some discussion as to the

placement of such a rule. Professor Ward felt that it might best be included at the end of the rules. Judge Friendly moved that a provision for local rules be included in the rules at some appropriate point, and the motion was carried.

Rules 1, 29, 16 and 34 were approved as drafted, and Rules 2, 5, 7, 8, and 34x were approved with the changes noted above.

ITEM B. Approval of Rules Previously Considered.

Judge Prettyman stated that the rules in this item had been considered by the Committee at previous meetings and had been referred back to the Reporter for various changes.

Rule 6. Time for Filing the Notice of Appeal.

Professor Ward noted that the Admiralty Committee had requested that the time be extended for a longer period than 7 days, since the parties were not responsible for mailing the copies of the notice of appeal. Judge Barnes moved that "7" be changed to "14", and the motion was carried.

Judge Friendly moved that the suggestion of the Reporter in his Note 2 be adopted, inserting "as to all parties" between "appeal" and "is" in the second paragraph of Rule 6(a). Without objection, it was so ordered.

Judge Friendly also moved that the phrase "based on the failure of a party to learn of the entry of judgment" be stricken from the third paragraph of 6(a). He felt this language had been rendered meaningless by the recent decision of the Supreme Court in the Harris Trucking case. Mr. Stern moved that an extension be permitted "for other good cause", so that the sentence would read "Upon a showing of excusable neglect, or other good cause, the district court . . .". Both motions were carried.

Judge Prettyman suggested several editorial changes in the draft of Rule 6. In 6(a), the first sentence of the second paragraph was amended by adding "in this rule" after "hereafter enumerated". In Rule 6(d) "United States" was substituted for "government" in the sixth sentence.

Judge Maris suggested amending the second sentence of Rule 6(d) to provide that "A motion for leave to appeal in forma pauperis shall, if granted, be treated . . .". Professor Ward agreed that this would avoid possible misinterpretations of the rule and favored the additional language. The Committee agreed to adopt Judge Maris' suggestion.

Judge Friendly moved that subdivision (e) of Rule 6 be stricken in the light of the Committee's liberalization of the provision in subdivision (a) for excusable neglect. Without objection, it was so ordered.

Mr. Slade brought the Committee's attention to the provision in Rule 6(d) which allows the district court to extend the time for filing an appeal upon a showing of excusable neglect. He felt that this provision should be made consistent with the amended language of 6(a) by adding "or other good cause". Mr. Slade's motion was carried, afterwhich he expressed his view that adding the "good cause" language in either place would have the effect of lengthening the time of appeal in many cases because of the broad construction given to the "good cause" language, as opposed to the narrowly construed "excusable neglect" language. Several members of the Committee agreed with Mr. Slade's disapproval of the "good cause" language. Judge Maris felt that by dropping "based on the failure of a party to learn of the entry of judgment" the Committee had broadened the provision as much as it should be. Judge Barnes moved that "or other good cause" be stricken from Rule 6(a) and (d) so that these provisions would read "Upon a showing of excusable neglect the district court may . . .". This motion was carried.

Professor Moore felt that this provision should be included in the rule on bankruptcy appeals. Judge Maris pointed out that until the Supreme Court is granted rule-making power in bankruptcy this rule must follow the statutory provisions, and that after rule-making power is granted, bankruptcy appeals will be included in the general provisions on civil appeals.

Judge Opper questioned whether extensions of time for excusable neglect also applied to cross-appeals. The consensus of the Committee was that they do, and the Reporter was instructed to make this clear, either in the rule or in a note.

Rule 17. Transmission of the Record on Appeal.

Professor Ward briefly explained his alternate draft of Rule 17(a) and (b). Judge Friendly stated that he preferred the reporter's draft but suggested that the last sentence of (a) be combined with the first sentence of (b) to provide that when the record is complete for purposes of the appeal, the clerk of the district court shall promptly transmit it.

Judge Maris suggested that the Reporter's parenthetical language in (b) be deleted. Judge Sobeloff questioned the provision of the appellant requesting the clerk to transmit the record to the court of appeals. He felt that the duty should be the clerk's. Judge Maris agreed, and pointed out that the appellant could always make such a request without a provision in the rules. Mr. Stern moved that Judge Friendly's suggestion (set out above) be incorporated in the rule by striking the present last sentence of (a) and the first sentence of (b) and providing in a new first sentence of (b): "When the record is complete for purposes of the appeal, the clerk of the district court shall promptly transmit it to the clerk of the court of appeals." This motion was carried.

Judge Opper felt that the rule should state specifically that the record should not be transmitted until the requisite fees have been paid in the district court. Professor Ward felt that it would be undesirable to spell out all the requirements for transmittal, and Mr. Slade pointed out that the record would not be considered complete for transmission until all the fees had been paid. Judge Opper suggested that this be made clear in the Committee Note, and it was so ordered.

The Reporter's alternate drafts of Rule 17(a) and (b) were approved as amended, and subdivisions (c), (d), and (e) were approved as drafted.

Rule 18. Docketing the Appeal; Filing the Record.

After a brief discussion of the Reporter's alternate draft of Rule 18, Judge Maris stated that he preferred the Committee draft which specifically provides for docketing the appeal. He felt that Professor Ward's objections as to the ambiguity of the procedure in the present draft could be met by amending the first sentence as follows: "The appellant shall, at or before the time of filing the record, pay to the clerk . . .", and by amending the second sentence similarly: ",. . . the clerk shall enter the appeal upon the docket at or before the time of filing the record without prepayment of the docket fee." This amendment would provide that the docketing and filing would be done simultaneously, unless there was a reason (such as an application for a stay) to docket the appeal before the record was filed. Judge Maris also felt that the Reporter's parenthetical suggestion should not be included in the rule. The Committee voted to adopt Judge Maris' suggestions.

The Committee also agreed to strike the Reporter's parenthetical suggestion in the original draft of 18(b).

Judge Friendly moved that the words "40 day period following the filing of the notice of appeal" in Rule 18(c) be stricken, and "time limited therefor" be substituted, so that the rule would make clear that the court may require the record to be transmitted within an extended period as well as within the original 40-day period. Without objection, it was so ordered.

Judge Opper suggested that 18(c) provide in the second paragraph that the district court may extend the time for transmission on its own motion. Judge Prettyman suggested inserting after "the district court" the words "with or without motion,". This would take care of the situation where the clerk is unable to get the record completed within the alotted time. Judge Opper further suggested that in the next line "any" be substituted for "the" so that the phrase would read "but in a civil case any request for extension . . .". Mr. Ash felt that "request for" should be deleted to make it clear that either the parties or the clerk could initiate the granting of an extension. No formal action was taken on these suggestions.

Rule 18(d) was approved as drafted.

Judge Maris suggested that the provision for designating the parties in the title of the case as they were in the proceedings below be placed in a subdivision of Rule 18. The Reporter agreed that this would be a logical place for including that provision, which the Committee had previously approved in principle, and this suggestion was adopted.

Rule 30. Computation and Extension of Time.

Professor Ward pointed out that in the last sentence of (a) "permanent" should be changed to "principal".

Judge Sobeloff questioned whether the rule should provide an automatic extension of time for a day which is a legal holiday in the state where the attorney resides, but is not a holiday in the state of the clerk's office. It was the consensus of the Committee that this situation would not occur often enough to warrant its inclusion in the rule, and approved Rule 30(a) as drafted.

Professor Ward questioned whether the Committee wished to delete the last sentence of subsection (b) relating to agency appeals. He stated that the Appellate Rules will not cover the types of relief mentioned in the sentence; that the extension of time for these is statutory. It was the consensus of the Committee, however, that while this sentence may be surplusage, it would serve a purpose in educating the bar, and for that reason is desirable. On Judge Barnes' motion, the Committee voted to retain the sentence.

Subdivision (c) was approved as drafted.

Rule 31. Motions.

Judge Prettyman stated that the Committee should consider at this point the questions raised during the morning session as to what matters may be determined by single judges.

Mr. Stern stated that he favored the inclusion of the Reporter's suggested language on page 2 of B-5:

> "Motions for procedural orders may be determined ex parte. If a motion seeks dismissal of the appeal or other substantial relief, any party may file an answer in opposition within 7 days after service of the motion."

Judge Friendly felt that an exception should be provided to the 7 days allowed for answers in opposition to motions so that the court may direct that the answer be filed in a shorter time. The Committee voted to include the language set out above, inserting "or such other time as the court may direct" between "7 days" and "after service of the motion."

The Committee next discussed the question of authorizing a single judge to pass on motions, orders, etc., as a single judge, or for the court. Judge Maris stated that the statute provides that a quorum of the court is two judges. He further stated that it might be advisable to ask Congress to amplify this statute to allow a single judge to pass on procedural matters. After further discussion, Judge Maris suggested that the rules provide that the court of appeals may, by rule or order, authorize a single judge to hear procedural motions. He felt that authorization by the court of appeals, rather than by the rules, would be desirable in the light of the present statutory provisions.

Judge Prettyman was in accord with Judge Maris' suggestion, which would allow each court of appeals to set up, by some formal action of the court, its own procedural process for dealing with this problem. Professor Ward was directed to draft such a provision for inclusion in Rule 31, and to explicity state that a court of appeals may authorize a single judge to act on procedural matters.

Rule 32. Briefs.

Mr. Stern suggested substituting "other authorities" for "text books" in paragraph (1) of Rule 32(a). Without objection, it was so ordered.

Judge Friendly moved that paragraph (4) of 32(a) be amended to add a new first sentence providing that the argument may be preceded by a summary. Without objection, it was so ordered.

Mr. Stern moved that paragraph (4) be further amended as follows to include in the argument page references to the record:

> "... with citations to the authorities, statutes and pages of the record relied on."

Without objection, it was so ordered.

Judge Maris questioned the use of "libellant" in Rule 32(d), third sentence, since it is a descriptive term used in the district court in admiralty cases. After some discussion Judge Friendly moved that the third sentence be stricken as repetitive of the first sentence, and that the reporter recast the subdivision in the light of the excision. Without objection, it was so ordered.

Judge Maris asked for some clarification of the need for agreement by the parties to file typewritten briefs as provided in Rule 32(e). Mr. Stern pointed out that it would eliminate confusion which might result if one party used the typewritten system and the other the system of referring to pages of the original transcript. Professor Ward added that he felt an attorney should have some control as to whether he will have to work with a brief without specific page references to the record until final printing is done. Judge Barnes moved that this agreement between the parties be "in writing filed with the clerk", and without objection, it was so ordered. He further moved, after a suggestion by Mr. Stern, that the time for filing briefs be changed from 7 days to 14 days when this system is used, and the Committee voted in favor of the motion.

Mr. Stern suggested that the rule on colors of briefs (in Rule 34x) include provisions that the reply brief should be a different color than the original brief, and that the brief of an amicus curiae be the same color as that required for the brief of an intervenor. The Committee voted to adopt these suggestions.

Rule 32x. Brief of an Amicus Curiae.

This rule was approved as drafted.

Rule 33. The Appendix to the Briefs.

Mr. Stern moved that the third sentence of Rule 33(b) be amended as follows:

> "The appellant shall include in the appendix the parts thus designated, and may add such additional parts as are deemed necessary to meet points raised in the appellee's brief."

The motion was carried, and Rule 33 was approved as amended.

Rule 44. Costs.

Professor Ward stated that he felt it would be sufficient to mention in the Committee Note the statutory provisions (such as 28 U.S.C. § 1928) for costs in certain types of cases, rather than dealing with them in the rule itself. He said that the circuit rules generally do not treat this subject, and those parties entitled to invoke such statutory provisions will invariably invoke them without a reminder in the rule. The Committee was in agreement that this treatment would be satisfactory.

Judge Maris felt that "mandate" should be substituted for "judgment" in paragraph (d) of Rule 44, since it more accurately describes the action of the clerk in transmitting to the district court the judgment and any other information the district court should have, including the costs. Without objection, the Committee voted to adopt Judge Maris' suggestion, and paragraph (d) was amended as follows:

> "The clerk shall insert in the mandate the amount of costs taxed in the court of appeals and shall annex the bill of items taxed in detail."

Judge Rives moved that the last sentence of 44(a) be amended as follows:

> "When a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court."

Without objection, it was so ordered.

ITEM C. Suggested Drafts of Rules not Previously Considered.

Rule 9. Bond for Costs on Appeal in Civil Cases.

Judge Barnes questioned the meaning of the phrase in the second sentence "or other security including the event of appeal is filed." Professor Ward stated that the language applied to admiralty cases, and Judge Friendly suggested amending the phrase to read ". . . is or has been filed." Mr. Shafroth suggested that the phrase be clarified in the Committee Note. Judge Sobeloff suggested that it be made "less evident and more clear", and the Reporter agreed to attempt this difficult task.

Mr. Stern felt that the rule should permit cash to be used as security. Since the clerk is authorized to handle cash, there would be no objection from that standpoint, and the Committee agreed that particularly in cases involving large sums of money, it may be less expensive for the party to offer cash for security than to buy a bond. Mr. Stern moved that in Rule 9 all references to "a bond" be amended to read "a bond or other security." Without objection, it was so ordered.

Judge Jameson moved that the normal bond of $250 be raised to $500. After some discussion, the Committee agreed that $250 was adequate for the average case, and that special provisions allow for additional amounts in unusual cases, and Judge Jameson withdrew his motion.

After a discussion of the advisability of retaining the provision that no approval of a $250 bond is necessary, the Committee voted to recommit Rule 9 to the Reporter for redrafting to make it clear that the clerk can determine the sufficiency of the surety of a $250 bond, but that the approval of the amount is not in question.

Rule 10. Stay of Judgment or Order of the District Court Pending Appeal.

Professor Ward stated that he had set out in his notes to this rule the case authorities for permitting a single judge to grant stays, and this draft was a statement of the present practice.

After a full discussion, Judge Friendly spoke in favor of providing in the rule that a motion for stay may be decided by a single judge. Judge Miller agreed. Judge Rives felt it was wrong for a single judge to decide such matters, even though there may be authority and precedent for it.

Mr. Stern stated that it would be helpful to state what the application for a stay should contain. He suggested amplifying the provision in the second sentence of the quoted language on page 10 of Agenda Item C-2, as follows:

> "The application should set forth the reasons for the relief requested and the facts relied upon, supported by affidavits or other sworn statements or copies thereof, if the facts are subject to dispute. With the application shall be filed copies of such parts of the record of the court below as are pertinent and available, and timely notice of the application shall be given the opposing party or his counsel."

Judge Friendly moved that the reporter include language to this effect, in such a way that the needed flexibility of the rule be preserved. Without objection, it was so ordered.

Mr. Slade asked that the Committee Note make clear that the notice of appeal must have been filed before this rule takes effect.

Judge Barnes moved to resolve the earlier discussion concerning the authority of a single judge to grant stays by retaining this provision in the rule. The motion was carried.

Professor Moore suggested that in this rule "motion" be substituted for "application". He pointed out that in Rule 31 a motion is considered an application to the court for an order or for relief, and therefore should be used in this rule. The Committee adopted this suggestion without objection, and the Reporter was instructed to make this change and any others necessary to carry out this decision.

Rule 11. Bail Pending Appeal.

Judge Maris suggested amending the third sentence of this rule by substituting "not in session" for "in vacation". Judge Rives moved that the phrase "when the court is in vacation" be deleted entirely to permit an application to be made to a single judge when a panel is in session, perhaps in another state. This motion was carried.

Judge Friendly felt that the rule should be modified so as to encompass two situations: (1) When the bail fixed by the trial court is alleged to be excessive, and (2) When there is a motion to enlarge the bail limits. The Reporter was instructed to modify the second sentence of the rule to cover these two situations. Judge Friendly stated that it was desirable to include a rule on Bail Pending Appeal in order to focus attention on the fact that review of pre-conviction bail orders are appeals. He felt the rule should be simple and require only a notice of appeal to be filed, permit motions to be heard on affidavits and without briefs of any kind, since the issues are almost always factual rather than questions of law. Professor Ward stated that the Criminal Rules Committee's Reporter had expressed agreement that

some simple procedure is needed in the rules to cover appeals from pre-conviction bail orders. Judge Friendly's suggestions were approved by the Committee, and the Reporter was instructed to prepare a draft which would carry out these suggestions.

Rule 26. Application for Writ of Mandamus or Prohibition.

Judge Maris stated that he thought this was a good rule, and excellent in providing that the district judge named as respondent would not be required to file an answer or advise the clerk that he is not, but he felt that some language should be included to make it clear that failure of the judge to answer shall not be taken as an admission of the petition. Judge Barnes expressed the consensus of the Committee that it is desirable for the judge to be in a position of neutrality which would be provided by including at the end of the fifth sentence, as Judge Maris suggested, "but the petition shall not thereby be taken as admitted." This suggestion was adopted by the Committee.

Judge Friendly questioned whether it would be better to treat applications for mandamus as motions and require the answer to be filed before the court of appeals considers it. Judge Maris felt it was better to screen the applications first so that the district judge is not even aware of the mandamus application unless the court of appeals feels there is some merit to it. Judge Rives and Judge Barnes agreed that this "screening" process is desirable.

Mr. Stern suggested that the fourth sentence be clarified by amending it to read as follows: "All parties below other than the petitioner shall also be deemed parties for all purposes." This suggestion was adopted by the Committee.

Judges Friendly and Sobeloff suggested that since this rule pertains only to writs against a judge or judges, the title of the rule be changed to read "Application for Writ of Mandamus or Prohibition Directed to a Judge or Judges." This suggestion was approved by the Committee.

On Mr. Stern's suggestion, the Reporter was requested to make clear in the Committee Note that this rule only applies to writs directed to a judge or judges, and does not preclude other writs to which a party may be entitled.

Rule 37. Substitution of Parties.

It was the consensus of the Committee that the bracketed language in subdivision (a) be included as part of the rule, with the addition, suggested by Judge Rives, of "or his personal representative" after "attorney of record".

On suggestion by Mr. Stern, the Reporter was instructed to redraft the first sentence of (a) to make clear who shall make the motion for substitution of a deceased party.

Judge Barnes moved that subdivision (b) be amended in part to read "... in accordance with the procedure outlined in subdivision (a)." Without objection, it was so ordered.

The meeting adjourned at 4:50 p. m.

The meeting reconvened at 9:30 a. m., May 21st. Judge Sobeloff was unable to attend the meeting for the day, and Mr. Ash and Judge Jameson could not be present at the morning session due to prior commitments at the American Law Institute. Judge Maris was unable to attend the session on the 21st and 22nd due to hearings in Chicago.

Rule 42. Entry of Judgment.

Judge Prettyman read Judge Maris' suggested language for the second and third sentences of Rule 42, as set out in Judge Maris' letter to Judge Prettyman dated May 19, 1963, as follows:

> "The clerk shall enter the judgment of the court on the day the opinion is filed unless the opinion directs the settlement and entry of the judgment or decree at a later time. If the judgment is to be rendered without the filing of an opinion it shall be entered upon instruction from the court."

Judge Friendly stated that in his opinion this suggested language met the Reporter's point about enforcement decrees in agency cases. Judge Prettyman stated that in every case there must be something in writing as to the disposition of the case, and he felt that the rule should state that all cases should be disposed of either by a judgment or an order of the court. Mr. Slade added that this written and dated action is important in beginning the time running for appeal.

Mr. Stern noted that the rule should make clear that the time for filing a writ of certiorari does not begin to run until the final order is approved by the judge.

Judge Barnes moved that the Committee adopt Judge Maris' suggested language with the substitution of "court" for "opinion" in the second line as set out above. Without objection, it was so ordered.

Judge Friendly felt that the opinion should be sent to the parties as soon as it is entered, even if the actual judgment has not yet been entered or has to be settled. Mr. Slade suggested splitting the last sentence of Rule 42 as drafted into two sentences, providing separately for entering the opinion and mailing copies of the opinion to the parties, and for entering the judgment and notifying parties of the date of entry of the judgment. Judge Barnes suggested the following language: "The clerk shall promptly mail to all parties a copy of the opinion, if any, and of the judgment if no opinion was written, and notice of the date of entry of judgment." The Committee seemed in agreement that if the judgment was merely a formality reflecting the conclusion of the opinion, it should not be necessary to mail copies of it to the parties. However, the parties do need to know the date of the entry of judgment. Professor Ward was instructed to redraft this rule keeping in mind Judge Maris' suggested draft and the various suggestions of the Committee.

Rule 45. Petition for Rehearing.

Judge Barnes stated that in his circuit in particular, the 15-day provision was too short. Judge Friendly suggested adding "or such other time as the court may fix" after "15 days" to allow the court to set a longer or a shorter period as the situation may warrant. He further suggested that any petition for rehearing dealing with matters in the opinion must be filed within 15 days of the filing of the opinion or such other time as the court orders. This would prevent a delay that might result from the entry of a judgment long after the opinion because of settlement of a decree or some other reason.

Mr. Slade objected to the provision in the fourth sentence requiring the court to request a reply to the petition for rehearing before granting it. He felt that this should be left to the discretion of the court since there are some cases in which a reply will not be necessary for the court's decision. He suggested striking the language "but a petition for rehearing will not be granted in the absence of such a request." Judge Friendly agreed that this could be left to the discretion of the court. Judge Rives suggested that the provision be retained but suggested an amendment as follows: "but a petition for rehearing will ordinarily not be granted in the absence of such a request." This suggested language was adopted by the Committee.

Mr. Stern suggested that a time limit be set on filing the reply to the petition for rehearing. The judges objected to this suggestion on the ground that the cases vary to such an extent that it would be better to allow the judge to set the time for reply in each case.

Mr. Stern felt that 25 copies of the petition should be filed instead of 20 as the draft provides. This change would require the same number of copies of the petition for rehearing as are required for the briefs, and was adopted by the Committee without objection.

Rule 36. Determination by the Court En Banc.

Judge Prettyman noted Judge Maris' objections to this rule, set out in his letter of May 19th. He stated that, contrary to Judge Maris' view, he felt that a rule on en banc hearings should be included in the Appellate Rules. The Committee seemed in agreement that a rule would be desirable.

Judge Prettyman asked the Committee's views on how the en banc procedure should be initiated within the court -- by a single judge or in some other way. Judge Friendly felt that a single judge could initiate a request for an en banc hearing, and Judge Prettyman stated that he felt that any active judge should have this power, regardless of whether he was on the panel that heard the case. After a judge has made such a request, a majority of the active judges of the court must vote affirmatively in order for an en banc hearing or rehearing to be ordered.

The next question raised was whether parties or their counsel could request a rehearing en banc. The Committee was in agreement that a suggestion from counsel for a rehearing en banc is appropriate, and also agreed that it would not be necessary to suggest a rehearing by the panel and a rehearing en banc in two separate documents. These both could be included in one document.

Judge Friendly questioned the provision in the Reporter's draft that no formal order will be entered denying the suggestion by counsel for a hearing or rehearing en banc. Judge Rives felt that it was not necessary or practical to notify counsel of this denial, but only to notify them if the suggestion had been favorably considered. He outlined his view of the procedure as follows: After counsel has made a suggestion to the court, if one judge feels hi should be granted a hearing or rehearing en banc he notifies the court and by this action requests the court to decide whether the proceeding should be heard en banc. It should be made clear that counsel alone cannot request the court to decide, but can only suggest that one or more of the judges of the court provoke a vote on the suggestion.

Judge Friendly suggested that the rule state clearly that no vote will be taken unless requested by an active judge of the court.

Mr. Slade suggested that the provision read in substance as follows: Counsel may, in connection with the petition for rehearing covered by Rule 45, suggest the appropriateness of a hearing or rehearing en banc. The hearing or rehearing en banc will only be granted if one of the active judges of the court causes the other judges to decide. If the rehearing (by the panel) is denied, no separate formal order in response to the suggestion of counsel need be made unless the rehearing en banc is ordered.

Judge Rives moved that, in accordance with Judge Maris' suggestion, the words "on suggestion of counsel" be stricken from the second sentence of the second paragraph. Without objection, it was so ordered.

The Committee voted to eliminate from the last sentence of the rule the provision that a petition for rehearing en banc be separate from the petition for rehearing by the panel.

A majority of the Committee felt that some notification should be made to counsel that their petition had not received the approval of the majority of the active judges of the court, and voted not to include a provision such as that in the second to last sentence of the rule.

Mr. Stern suggested the addition of a provision that the petition for rehearing en banc must be filed within the time provided for rehearing by the panel. Judge Opper pointed out that this would have the practical effect of forcing counsel to request both a rehearing by the panel and a rehearing en banc at the same time. It was the consensus of the Committee that this result would be desirable, and the suggestion was adopted.

Judge Miller asked whether the Committee contemplated setting a time limit for deciding a suggestion for an original hearing en banc. Judge Friendly and Judge Barnes thought this would be impractical due to the variance among the courts of appeals in calendars, etc., and would best be left to the discretion of each court.

The Committee next discussed the phrase "...(2) when the proceeding involves novel questions of general importance." Judge Prettyman objected to the use of "novel", stating that, for example, a capital case was not novel, but was of general importance. Judge Rives suggested language such as "novel or unusually important questions". Mr. Stern felt that the draft should

make more obvious that the grant of an en banc hearing or rehearing is within the full discretion of the court, and Judge Friendly suggested that the Reporter attempt a condensation of the Supreme Court Rule covering this portion of the rule. This suggestion was adopted by the Committee.

Rule 46. Issuance of Mandate.

Professor Ward replied, in answer to Judge Miller's question, that a single judge has the power to stay a mandate. However, because of statutory provisions, the rules cannot require that the mandate be stayed only by a judge who participated in the decision of the case.

The Committee agreed that Judge Maris' point on this rule had been met by the Committee revision of the draft of Rule 44.

On Judge Friendly's suggestion, the last sentence of subdivision (a) was amended by adding "unless the time is shortened or enlarged by order." Judge Friendly also stated that he had serious objections to the provision in (b) allowing the stay to be extended for the 90-day period permitted for filing a petition for certiorari in the Supreme Court. He felt that the effect of this provision, if adopted, would be for the court of appeals in many cases to deny the stay rather than allowing it to continue for 90 days. Judge Rives agreed with this view, and stated that ordinarily 30 days is enough time for the party to prepare his petition for certiorari, and in the rare case where it was not sufficient the court could grant additional time.

Judge Friendly moved that the second sentence of (b) be amended to read as follows: "The stay shall not exceed 30 days or such other time as the court may allow." The provision in the third sentence would not be changed. This motion was carried.

Professor Ward asked the Committee to consider Judge Rives' suggestion that supersedeas bond be allowed in the court of appeals. Judge Rives stated that he felt the court of appeals should be able to issue a supersedeas bond to correct an insufficiency in surety or amount on a stay for application for certiorari. Judge Miller moved that such a provision be included in the rules and without objection, it was so ordered.

Mr. Slade moved that the time period for issuance of the mandate be changed from "fifteen days" to "twenty days". This would allow a little extra time to the parties to compensate for the time which elapses between the date of entry of judgment and the actual receipt of the notice by the parties. This motion was carried.

On suggestion of Judge Barnes and Judge Friendly, 7 days was supplied in the last sentence as the number of days after which the mandate shall issue when the petition is denied.

Rule 35. Oral Argument.

The Committee discussed the provision for time to be allowed for oral argument. Some members felt that each circuit should, by local rule, fix the time allowed for oral argument. Mr. Slade stated that in his opinion it would be wrong to cut short this important part of the presentation of the case. Several of the judges expressed the view that better and less repetitive oral arguments result from providing a shorter period, and that more time will always be allowed for counsel in the exceptional case. The District of Columbia practice of allowing "automatic" 15-minute extensions upon request by the parties was discussed. Mr. Stern favored making this practice the uniform rule. Judge Friendly moved that the time for oral argument be fixed by local rules. There was a tie vote, with several members not voting, and a decision on the motion was not made pending further discussion.

Judge Barnes moved to combine the Reporter's draft and Judge Friendly's motion by providing in the rule that each side will be allowed 30 minutes for oral argument unless otherwise provided by local rule. This motion was carried.

After a discussion of the number of counsel which should be permitted to appear for each side or interest, Judge Friendly moved that the rule say nothing on this subject in view of the great variety of situations which arise. He felt that counsel usually settle this satisfactorily among themselves, and the court will see that all interests are represented in the oral argument. This motion was carried by a vote of 5 to 3. Dean O'Meara stated that he thought some target number should be provided, and Judge Friendly suggested that to meet this point the rule provide that not more than one counsel can appear for the same interest, unless the court otherwise orders. This suggestion was not adopted by the Committee.

Subdivisions (d) and (e) of Rule 35 were approved as drafted.

Mr. Stern questioned whether it was necessary for the opening argument to contain "a fair statement of the case." He felt that this lessened the time of the appellant for the main body of the argument. It was the consensus of the Committee that the statement of the case was helpful to the court in distinguishing each case from others under consideration, and therefore should be retained.

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Judge Rives felt that the third sentence of subdivision (c) should be stricken as it, in effect, gives the lawyers instructions on arguing the case. He felt that the second sentence should be retained. These suggestions were adopted by the Committee without objection.

Judge Barnes asked how this rule would function in the event of a cross-appeal. Professor Ward stated that a separate rule would be drafted on multiple appeals which would clarify the oral argument procedure, and other situations where the general rules would need amplification with respect to multiple appeals.

Judge Opper stated that there should be some provision in Rule 35, or Rule 47 or 34, that the appellee may move to dismiss the appeal, or the court on its own motion may dismiss an appeal where the appellant has failed to file his brief. Professor Ward stated that he has made such a proposal in Agenda Item C-11 for incorporation as subdivision (d) of Rule 34. Judge Prettyman asked Judge Opper to raise this point again as part of the discussion of Rule 47.

Rule 43. Interest.

Professor Ward stated that this draft makes clear that where a judgment is affirmed in the court of appeals, the result with respect to interest is as if no appeal had been taken, and where a judgment is modified or reversed, it directs the court of appeals to include in its mandate instructions as to interest. Judge Friendly suggested that if the court of appeals makes no direction as to interest, the pre-judgment and post-judgment interest shall be decided by the district court. Mr. Ash agreed that the district court is bettwe able to decide these questions of interest.

Judge Friendly suggested amending the second sentence as drafted by adding ". . . , the judgment entered in the district court shall include pre-judgment and post-judgment interest as allowed by law, unless the mandate of the court of appeals has otherwise directed." Without objection, this suggestion was adopted by the Committee.

Rule 43x. Damages for Delay.

Judge Prettyman noted Judge Maris' suggestion to change "shall request" to "may request" in the last sentence of the rule. Judge Opper suggested combining the provision with the preceding sentence, i. e. "to the appellee, if the appellee has requested such damages in his brief." Judge Rives suggested striking the last sentence to make it clear that the court may on its own motion award damages or double costs to the appellee. This would give the court a freer hand to exercise its discretion, and the sentence was stricken from the rule.

Rule 47. Voluntary Dismissal.

Judge Barnes moved that Judge Maris' suggestions on this rule be adopted, so that the first sentence would read in part "... the clerk shall enter the case dismissed, and shall give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court." Judge Barnes further moved that a reference be included in this rule to fees of the clerks. These motions were carried.

Professor Ward stated that involuntary dismissals are mentioned in three places in the circuit rules: as a result of failing to file the record, failure to file the brief on time, and failure of the appellant to appear for oral argument (in certain circuits). He further stated that he felt no special rule on involuntary dismissal was necessary, but that the suggested language for Rule 34 at the bottom of page 10 of Agenda Item C-11 would be desirable in providing the appellee a remedy in the case where the appellant fails to file his brief on time. After some discussion, the Committee decided to include this new subdivision to Rule 34:

> (d) If an appellant fails to file his brief within the time provided by this rule, an appellee may move for dismissal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

Professor Ward suggested deleting the last sentence of subdivision (d) of Rule 35, as it duplicates the provision just added to Rule 34. This suggestion was adopted by the Committee.

Consideration of Omission of Certain Rules Now Generally Found in Circuit Rules.

(1) Rule on Physical Exhibits.

Judge Prettyman noted Judge Maris' comment that a rule on this subject is useful particularly in patent cases, and should be retained. Judge Barnes agreed with this view, and it was the consensus of the Committee that such a rule be included in the Appellate Rules. Judge Prettyman stated that it was his view that the rule should provide that the physical exhibits should not be transmitted to the court of appeals as part of the record unless the parties agree to do so, or unless the court so orders. This suggestion was referred to the Reporter for consideration.

(2) Rule on Cases Involving Constitutional Questions Where United States is Not a Party.

Mr. Slade stated that a rule on this subject would be very helpful to the government because it is impossible for the Department of Justice to keep track of cases in which it is not involved on the district court level. It was the consensus of the Committee that such a rule be included, and the Reporter was instructed to prepare a draft.

(3) Rule on Translations.

It was the consensus of the Committee that a rule on translations was not necessary.

ITEM D. Consideration of Rules Respecting Appeals in Forma Pauperis.

D-1. Applications for Leave to Appeal in Forma Pauperis -- General Provisions.

The Committee proceeded by discussing the questions raised by the Reporter in his note preceding the draft rule:

(1) Where is the application for leave to proceed on appeal in forma pauperis initially to be made? Professor Ward stated that he felt the first application should be made to the district court, and the Committee concurred in this view.

(2) Is there any time limit on making an application to the court of appeals following denial in the district court? The Committee agreed with the Reporter that a 30-day limit should be required by the rule.

(3) What should the application for leave to appeal in forma pauperis contain? The Reporter suggested that a simple statement that the defendant is unable to pay the costs of the appeal should be sufficient. Some members of the Committee felt that more should be required, and after a full discussion Judge Barnes moved that an official form be drafted to be attached to the affidavit in support of the application for leave to appeal in forma pauperis, which would contain some factual information as to the alleged indigency of the appellant. Without objection, it was so ordered.

(4) The question as to the content of the affidavit was decided above.

(5) Should the trial court be required to state the reasons for denying the application for leave to appeal in forma pauperis? Several of the judges

expressed approval of such a requirement as being helpful to the court of appeals in acting on the application. Judge Prettyman opposed the inclusion of such a requirement. He felt that it would lead to the court of appeals reviewing the action of the district court instead of treating the application as an original proceeding. It was the consensus of the Committee that this requirement be retained, as stated in the last sentence of Rule 38(a), but that the words "with particularity" be stricken.

The Committee next discussed the question raised by the Reporter's draft of subdivision (b) of Rule 38: Should the proceeding in the Court of appeals be a review of the district court's decision or an original proceeding? The Reporter's draft provides for a new motion to the court of appeals, making it an original proceeding. Professor Ward stated that the statute allows application to any court of the United States. The draft provides that the application be made to the district court. If this is denied, the applicant may go to another "court of the United States" -- the court of appeals. The court of appeals is entitled to look at what happened in the district court to make sure that the rule requiring prior application has been complied with. The Committee agreed to defer decision on this question until the discussion of appeals in forma pauperis in criminal cases.

D-2. In Forma Pauperis Proceedings -- Criminal Appeals.

(1). This section of the Reporter's proposal, on page 8 of Item D-2, was approved by the Committee as drafted. This provision will be included in the Criminal Rules for the District Courts, and may also be included in the Appellate Rules.

(2). Judge Prettyman suggested that "district" be inserted before "court" in the first sentence of the Reporter's proposal (2). This suggestion was adopted by the Committee. Judge Prettyman further suggested that the Committee Note specify that if trial counsel does not care to assist the defendant in the preparation of the in forma pauperis appeal, the district court shall appoint other counsel to assist him. He stated that this proposal would solve a number of problems in criminal appeals, and meet the points raised in Coppedge and other cases. Judge Friendly felt that there should be some request made to the district court after denial of the application, to prepare the record and transmit it to the court of appeals, particularly since the defendant in every case will have counsel. The Committee seemed in agreement with this suggestion.

Mr. Slade suggested that this rule on criminal appeals in forma pauperis contain the same requirement for factual information concerning the indigency accompanied by a form, as was provided by the Committee in Rule 38. Judge Prettyman added that the general rule should indicate that there is a special rule covering in forma pauperis appeals in criminal cases.

Mr. Stern suggested that in the first sentence of (2) "setting forth" be changed to "showing his inability to pay . . .", and this suggestion was approved by the Committee.

The Committee approved the Reporter's proposal (2) with the changes noted above.

Judge Barnes questioned whether the rule should provide for in forma pauperis appeals made originally to the court of appeals. The Committee agreed that this was a rare case and could be handled on a case by case basis by the courts of appeals.

The Reporter's proposal (3) was approved as drafted, and the Reporter was instructed to incorporate (1), (2), and (3), as amended by the Committee, into a rule.

ITEM E. Consideration of Rules Respecting Habeas Corpus Proceedings.

Rule 40. Habeas Corpus Proceedings.

Professor Ward pointed out that a phrase was omitted from the draft at the beginning of the third sentence of subdivision (b). The words "If the district court has denied the certificate," should be inserted at the beginning of the sentence. The Committee approved this correction.

Judge Barnes suggested that "district" be inserted before "judge" in the first sentence of (b), so that the phrase would read "the district judge who rendered the order shall . . .". This would distinguish the district judge from the state court mentioned previously in the sentence.

Judge Friendly suggested some revisions of the third and fourth sentences of subdivision (b). He felt that applications to a single judge of the court should not be encouraged, and that these applications should be addressed to the court. Professor Ward stated that the statute does not give any authority to the court to issue certificates of probable cause, and the language of the draft was intended to meet the problem raised by In re Burrell, which reached

the result that each court of appeals should develop its own procedure in this area. Judge Friendly suggested eliminating the third sentence of (b) permitting the application to be made to a single judge of the court of appeals, and to provide in the fourth sentence that

> "A request shall in form be addressed to the court of appeals, but shall be deemed addressed to the judges thereof, and shall be considered by a judge or judges of the court in accordance with rules or order of the court."

This suggestion was approved by the Committee without objection, and Rule 40 was approved as amended.

Rule 41. Habeas Corpus Proceedings -- Custody of Prisoners.

Professor Ward stated that this was the Supreme Court Rule on habeas corpus which was promulgated by the Supreme Court and is binding on the courts of appeals and the district courts by its own force. The Committee agreed that this rule should be included in the Appellate Rules, and approved it as drafted.

ITEM F. Consideration of Rules Respecting Review or Enforcement of Orders of Agencies, Boards, Etc.

Judge Prettyman stated that there are several bills pending in Congress which would make the Administrative Conference of the United States a permanent body. If a bill is passed, the Administrative Conference will no doubt have a Committee on Judicial Review which will be making suggestions as to the judicial review of agency proceedings. He stated that the Administrative Conference Committee would probably be able to comment on the Appellate Committee's recommendations on this subject before the rules on agency proceedings are submitted to the Supreme Court for approval and promulgation.

Judge Prettyman explained that the Reporter had used the Uniform Rule on review of agency orders as his starting point in drafting and had made modifications of that rule in preparing the drafts of Rules 20-25.

Rule 20. Review or Enforcement of Orders of Administrative Agencies, Boards, Commissions and Officers -- How Obtained.

Professor Ward gave a brief explanation of his draft, and first asked the Committee to reconsider whether it was necessary to require a petition for review setting forth the details of the appeal. Several of the judges stated that they rarely ever read the petitions for review, since they did not as a rule narrowly define the issues in the case. After some discussion, Mr. Stern suggested drawing up a fomr which the petition for review should follow, and that the form follow th notice of appeal. The rule should then provide in effect that except where a statute prescribes the content of the petition for review, the petition for review shall follow the form prescribed by the rule. This suggestion was approved by the Committee.

Professor Ward mentioned a suggestion which the Administrative Conference had made for legislation to amend the NLRB Act to require that no answer is required to the petition for enforcement unless a respondent intends to contest the order. After some discussion, Judge Friendly suggested that the third sentence of subdivision (c) be amended to provide:

> "Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk a notice as to whether he intends to contest the order. If the respondent does not intend to contest the application for enforcement, the order of enforcement will be entered."

This suggestion was approved without objection.

The Committee also voted without objection to adopt Judge Maris' suggestion to restore the last sentence to the language of the Uniform Rule, as follows:

> "In each case the agency, board, commission or officer concerned shall be named respondent. The United States shall also be deemed a respondent, if so required by statute, even though not so designated in the petition."

Judge Prettyman mentioned a suggestion made by the General Counsel of the Subversive Activities Control Board to add to the first sentence of Judge Maris' addition "and where the case is adversary, the prevailing party or parties shall also be named as respondent or respondents." This would allow

a controversy mainly involving the parties and not the agency to be disputed by the parties without the agency becoming very much involved in the proceeding on appeal. Judge Friendly felt that when a party is interested enough he will either be asked to intervene, or he will himself seek to intervene, and opposed this suggested language. The Committee seemed in consensus with this view.

Mr. Stern suggested a change in subdivision (e) which would allow any party who participated in the proceeding before the agency to intervene as of right in the court proceeding by filing a notice of his intervention with the court of appeals. It was the consensus of the Committee that the rule as drafted provides the court some control over the parties in the proceeding and that this control is desirable to prevent a large number of intervenors from bogging down the proceeding. Mr. Stern's suggestion was disapproved by the Committee.

Mr. Stern suggested that subdivision (d) be amended to make clear that it is not necessary for the clerk to send copies of the agency opinion to the parties to the appeal, since they will have already received copies from the agency. The Reporter was instructed to make an appropriate change in the rule.

The Committee agreed that the parenthetical sentence in the draft of subdivision (b) should not be included in the rule, as it is obsolete in view of the original papers rule.

The Uniform Rule provides that unless the statute provides for intervention, a motion must be made. The Reporter states that this provision of the Uniform Rule causes problems since many statutes mention intervention but do not specify a procedure for it. He stated that subdivision (e) amends this provision by providing that anyone desiring to intervene must file a motion. The Reporter's draft was approved by the Committee.

The Committee next discussed the desirability of including the parenthetical sentence in subdivision (e). Professor Ward felt it was confusing in view of the original papers rule and the fact that the record below, whether or not it is sent up, continues to be the record on appeal. On Mr. Ash's motion, the Committee agreed to eliminate this sentence from the rule.

Mr. Stern questioned whether there should be some time limit on intervention. He was in favor of such a provision, and suggested 30 days. The Reporter was directed to consider this suggestion, and if there is no

statutory prohibition, to include a provision to the effect that motions to intervene shall be made within 30 days of the filing of the petition for review, unless otherwise ordered by the court.

Rule 20 was approved as amended.

Rule 21. The Record on Review and Enforcement.

The Committee voted to approve subdivisions (a) and (b) as drafted, and voted to delete subdivision (c) as being unnecessary.

The meeting was adjourned at 5:00 on May 21st.
The meeting reconvened at 2:00 p.m. on May 22nd.

Rule 22. Filing of the Record.

Professor Ward stated that the First Circuit had asked the Committee to consider requiring the agency to file the record with the application for enforcement. He said that it was his view that it would not cut down delay to require the record to be filed in a shorter time or simultaneously with the application since there is no fixed time within which the agency must file the application for enforcement. In addition, he pointed out that if the application for enforcement is not opposed there is no need for the record to be transmitted to the court of appeals. In accordance with this view, the Committee voted to delete the phrase in the first sentence of 22(a) which reads "or within ___ days after filing an application for enforcement," and to substitute therefor "or application for enforcement", so that the 40-day period would apply to petitions for review and to applications for enforcement. The Committee also agreed, on Mr. Stern's suggestion, that the rule should state that if the petition or application is not contested, it will not be necessary to file the record.

The Committee approved the Reporter's inclusion of a provision allowing the court to shorten as well as extend the time for filing the record, and also his provision that the clerk give notice to all parties of the date the record was filed.

Professor Ward suggested a revision of subdivision (b) to provide that the stipulation against parts of the record being sent be made with the agency rather than with the clerk of the court of appeals. After some discussion of this

proposal, Judge Barnes moved that the stipulation be filed with the agency, and that all such stipulations shall become a part of the record. In this way the clerk will receive the information as to which parts have been stipulated when he receives the record, and disputes among the parties will also be avoided. The Committee voted without objection to approve this motion.

The Committee asked that the Reporter clarify the provision for describing each part of the record and indicating its page numbers. It should be clear that what is wanted is the title of each part and the number of pages it contains. Professor Ward agreed to write to Judge Maris, who participated in drafting the Uniform Rule, for clarification of the language of the Uniform Rule on this point.

Judge Opper moved that the phrase "notwithstanding his prior stipulation" be inserted in the last sentence of 22(b) after "request of a party," and without objection, it was so ordered.

The Committee approved the Reporter's draft of subdivision (c), which allows the parties to stipulate that no record or certified list be filed with the court, with the addition of "Unless otherwise ordered by the court . . ." at the beginning of the subdivision.

Rule 23. Prehearing Conference.

The Committee agreed that this provision was necessary in the rules for agency appeals, and Rule 23 was approved as drafted.

Rule 24. Settlement and Entry of Decrees Enforcing Orders.

Professor Ward noted that the last sentence in the draft should be deleted since this provision was included in the general rule on entry of judgments.

Professor Moore suggested that in order to bring this rule into conformity with the rest of the general rules, "judgment" should be substituted for "decree" in the title and throughout Rule 24. This would be consistent with the Committee's attempt to eliminate formal distinctions between appeals in various types of cases. This suggestion was approved by the Committee.

Judge Opper suggested that the rule provide that if the agency does not file a proposed judgment within 10 days the respondent may file a proposed judgment. It was the consensus of the Committee that this should not be included, as the agency rarely fails to file the proposed judgment within 10 days, and the respondent may file a proposed judgment if he objects to the judgment proposed by the agency.

Rule 25. Applicability of General Rules to Review or Enforcement of Agency Orders.

This Rule was approved by the Committee as drafted.

ITEM G. Integration of Tax Court Rule with General Rules.

Professor Ward stated that the first sentence of Rule 19(a) inadvertently had not followed the revision approved by the Committee at the last meeting and out out on page 23 of the Minutes of that meeting. The sentence was corrected 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."

Mr. Stern suggested treating Tax Court appeals in the same manner as the agency appeals -- using the term petition for review thoughout the rules and providing a form for the petition for review which follows the form of the notice of appeal. Professor Ward stated that the whole purpose of the provision was to provide a petition for review that was as simple as the notice of appeal, and that the Committee Note will carefully explain that this provision does not go against the statutory provision for a "petition for review." Judge Opper agreed that the statute does not prevent the use of "appeal" throughout the rule, and it was the consensus of the Committee that the rule should remain as drafted.

Judge Opper distributed to the Committee an alternate draft of Rule 19 which incorporated the Reporter's provisions of his Rule 19x. He explained the arrangement and provisions of his draft in some detail, and the Committee

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discussed the Reporter's draft and Judge Opper's draft with respect to the provisions for applicability of the general rules and Titles II and IV.

Judge Prettyman objected to Judge Opper's inclusion of ". . . when appropriate and not inconsistent with this Rule 19,". Judge Barnes agreed that the inclusion of such a phrase defeated the intention of the Reporter to state without qualification which rules were applicable and which were not.

Professor Ward explained that his draft attempted to set out in one rule the procedure for initiating an appeal from a decision of the Tax Court, and that Rule 19x sets out in a separate rule the applicability of the general rules to all phases of the appeal. This was the format which the Committee had previously approved and circulated to the public. He stated that the repetition between Rule 19(e) and 19x was for the purpose of making the Committee's intention perfectly clear in this area, and also to promote readability of the rules.

Mr. Stern suggested combining all the provisions about applicability of the general rules into one subdivision of Rule 19. Judge Rives suggested transferring the first two sentences of (e) into 19x, since 19(e) relates only to the appeal, and 19x refers more broadly to the whole proceeding after the appeal has been established in the court of appeals.

Judge Barnes moved that the reporter combine Rule 19x with 19(e) in a separate paragraph, so as to avoid duplicate references to Rules 16, 17 and 18. This combined paragraph would become a subdivision of Rule 19. Judge Prettyman stated that if the general provisions were made a part of Rule 19, the present character of the rule would be destroyed. This motion was later withdrawn.

After further discussion, Dean O'Meara moved that the matter be referred back to the Reporter and Judge Opper for redrafting in the light of the discussion. Judge Prettyman felt that the Reporter should have some indication from the Committee as to whether it preferred the two-rule or one-rule approach. He polled the Committee, and the majority expressed approval of the Reporter's two-rule approach. Several members expressed the view that something be included in Rule 19x to refer to the previous mention of Rules 16, 17 and 18 in Rule 19(e). Judge Opper suggested that Rule 19x also include some mention of the fact that appellant refers to the petitioner for review, etc.

Mr. Stern repeated his suggestion that "petition for review", etc., be used throughout the Tax Court Rules. The Committee disapproved this suggestion, and on motion by Judge Barnes, referred the drafting of an explanatory note giving the Committee's reasons for using "appeal" to the

Chairman and Reporter for consideration and drafting. Mr. Ash made a motion for the record that review of Tax Court decisions be termed "appeals" in Rules 19 and 19x, and this motion was carried.

Judge Opper moved that in subdivision (b) of Rule 19 the second sentence be amended to conform to the statute by substituting "delivery" for "filing", so that the phrase would read "... the postmark date shall be deemed the date of delivery,..." Professor Ward explained that this change was inadvertently not made on this draft, and the Committee adopted the motion.

Judge Opper further moved that since the Committee had added "decision" to the draft of Rule 5(b), i.e., "shall designate the judgment, order, decision or part thereof appealed from ...", the first sentence of 19(c) could be stricken. He then moved that the last sentence of 19(c) be included as the last sentence of 19(b). Without objection, these motions were adopted by the Committee.

* * *

The Committee reiterated its approval of Mr. Stern's request to cooperate with a Committee of the Illinois Supreme Court which is beginning work on revising its rules. That Committee has expressed a desire to have access to the Appellate Committee's working papers, and the Committee authorized Mr. Stern to make his personal copies of the Committee materials available on a confidential basis.

Judge Prettyman stated that when the Administrative Conference becomes a permanent organization, he intended to ask permission from the standing Committee to make a formal request to the Conference for its views on the Appellate Rules covering appeals from administrative agency proceedings.

The Committee discussed possible dates for the next meeting, at which time it is hoped that the entire set of Appellate Rules can be approved by the Committee to be transmitted to the standing Committee and circulated to the bench and bar for comment. August 26th and 27th were agreed upon as the dates for the meeting.

The Committee members were encouraged by Judge Prettyman to make notes on their working papers and to bring these to the meeting, so that everyone's points may be raised without the necessity of reading each rule.

The meeting was adjourned at 4:30 p.m., May 22nd.