

MINUTES OF THE NOVEMBER 1961 MEETING OF  
THE ADVISORY COMMITTEE ON APPELLATE RULES

The second meeting of the Advisory Committee on Appellate Rules convened in the Supreme Court Building on November 16, 1961, 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  
Willard W. Gatchell  
William J. Jameson  
Shackelford Miller  
J. Edgar Murdock  
Dean Joseph O'Meara (absent Nov. 17)  
Richard T. Rives  
Simon E. Sobeloff  
Robert L. Stern

Bernard J. Ward, Reporter

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

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, James William Moore, a member of the standing Committee, and Aubrey Gasque, Secretary of the Rules Committees.

The Agenda for the meeting was taken up in three steps: first, a study of the proposed Tax Rule; second, consideration of the basic parts of rules for appeal from the district courts; and third, in forma pauperis matters.

ITEM A. Consideration of redraft of proposed rule for Review of Decisions of the Tax Court of the United States

Subdivision (a) was approved in the following form:

(a) Review of a decision of the Tax Court of the United States may be had by appeal. An appeal may be taken by filing with the clerk of the Tax Court within three months after the decision of

the Tax Court is entered a petition for review in the form of a notice of appeal. Appellant shall also file two conformed copies of the notice.

Judge Barnes raised the question whether in ordinary appeals the Government should have more time, especially in civil cases. The question as to when the notice of appeal should be filed was set aside for future consideration.

Judge Sobeloff suggested that the stricken part of the rule regarding excusable neglect be reinstated. Since this would call for statutory amendment, it was decided that it should not be included in the rule as submitted to the Judicial Conference, but that a memorandum should be prepared setting forth changes in the rule that call for statutory amendment.

Judge Barnes made a motion (which carried) that when statutory changes are requested, all measurements of time be changed from "months" to "days."

Original Subdivision (b), as approved by the Committee, now forms the second and third sentences of subdivision (a) as follows:

If a notice of appeal is filed by one party, any other party may file a notice of appeal within four months after the decision of the Tax Court is entered. Failure of an appellant to take any step other than filing a notice of appeal to secure the review of the decision appealed from does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

[Request for change of time to be made from months to days when statutory amendments are recommended. ]

As approved by the Committee the second paragraph of Subdivision (a) will read as follows:

The running of the time for appeal is terminated by a timely motion to vacate or revise a decision,

made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such a motion, or from the entry of a decision, whichever is later.

No formal vote was taken on the draft of subdivision (b) as submitted by the Reporter, although the only change suggested was that the rule allow filing by mail but restrict it to registered or certified mail. The Chairman stated that a recommendation of a change in the statute to that effect could be made. Subdivision (b) as drafted by the Reporter is as follows:

(b) The notice of appeal may be filed in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk, in which event the postmark date shall be deemed to be the date of filing, as provided in Title 26, U. S. C., § 7502.

The second sentence of subdivision (b) was approved as follows:

When the last day of the period for filing falls on a Saturday, Sunday, or legal holiday in the District of Columbia, the period for filing shall extend to and include the next succeeding day which is not a Saturday, Sunday, or legal holiday in the District of Columbia.

The Committee voted to delete original subdivision (f) which read as follows:

The notice of appeal shall be signed by the party taking the appeal or his attorney of record and shall be headed and captioned as the proceeding is headed and captioned in the Tax Court.

After discussion of the Reporter's draft of subdivision (c) [original subdivision (g)], the Committee instructed the Reporter to follow the language of Civil Rule 73(b), making changes in language to adapt it for the Tax Court.

The Reporter's draft of subdivision (d) was approved as follows:

(d) The clerk of the Tax Court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last address indicated by the files of the proceeding. Failure of the clerk to serve notice shall not affect the validity of the appeal. The notice shall be sufficient notwithstanding the death of the party or his counsel.

The Chairman requested that there be reserved for discussion at a later time the provision that failure of the clerk to serve notice shall not affect the validity of the appeal.

A motion was made and carried that subdivisions (e) and (f) be recast and the Reporter was instructed to redraft paragraphs (e) and (f) to incorporate the general notion that within 40 days the appellant shall pay the filing fee and thereupon the clerk of the circuit court of appeals shall docket the appeal and the clerk of the Tax Court shall certify and transmit the record within 40 days.

Judge Murdock also suggested that in redrafting these paragraphs the following suggestion of the Reporter be included:

"When more than one notice of appeal is filed, the clerk shall transmit such additional parts of the record as may be requested by any party, including such parts as may have been previously omitted by stipulation."

The Reporter was also instructed to incorporate in the provision for handling the record where appeals are filed from the same decision in two courts.

The Reporter's draft of subdivision (g) [original subdivision (k)] was approved by the Committee as follows:

(g) The Tax Court may dismiss an appeal prior to the docketing thereof in the court of appeals upon stipulation of the parties filed with the Tax Court or upon motion and notice by the appellant.

The inclusion of original subdivision (i) as the second paragraph of new subdivision (e) was approved.

After the appeal has been disposed of, the original Tax Court record shall be returned to the Clerk of the Tax Court.

The Reporter was directed to add to the original suggested form for Notice of Appeal that it should be accompanied by three conformed copies; and that a copy of the notice when originally filed in the Tax Court be sent to the Court of Appeals clerk. After discussion of a suggestion to change "designate that part" to "designate the issues appealed from", it was decided to leave the rest of the form as drafted by the Reporter.

ITEM C. Consideration of rule respecting content and transmission of record

Questions prepared by the Chairman and the Reporter with respect to the Record on Appeal were considered and acted upon by the Committee as follows:

1. The substance of the original papers should be included in the proposed uniform rules.
  - a. All papers in the clerk's file are needed, unless otherwise stipulated or ordered by the court.
  - b. The record on appeal shall include a copy of the docket entries.
  - c. Include in the definition of record on appeal, "and a transcript, if any is on file in the clerk's office."

d. Exhibits. The question was raised whether depositions should go up as original papers insofar as they are filed, or should the clerk eliminate such of the depositions filed with him as are not offered in evidence. The Committee decided all depositions should be included in the file, but they could still be eliminated by stipulation.

2. The following question was read to the Committee, but it was decided that it would be taken up later. However, it was not considered again: "Should original papers be deemed to include all documents in the District Court Clerk's files in the case? Or should he eliminate certain papers, as for example: Preliminary motions; memoranda of points and authorities; marshal's returns; and appearances of counsel."

3. The rule should include provisions respecting the record for preliminary hearing. In addition to docket entries the record shall consist of such papers as designated by the parties or required by the court.

4. The rule should include provisions respecting the power of the District and Appellate Courts to correct or modify the record.

[At this point there was a discussion of the method of procedure to be followed by the Committee. It was adopted as a policy to be followed that a uniform set of appellate rules should be drafted.]

5. The rule should include provisions respecting the record on appeal when no reporter's transcript was made in the lower court, or is unavailable.

Lunch 12:50 - 1:30

6. No formal vote was taken on the question: "Should the rule include provisions respecting the record on appeal where the parties present an agreed statement of the case?"

In the discussion, it was brought out that this is in Rule 76 of the Civil Rules. The Committee decided that though rarely done, when it does occur it would be very valuable to have a rule.

7. The rule should provide that the record on appeal be transmitted to the court of appeals. Judge Rives made a motion which was adopted that the rule authorize the court of appeals to permit token transmission -- that much autonomy should be permitted in a circuit. This would be discretionary in the particular case.

8. In answer to the question: "What should the rule provide with respect to the case where the original papers and other parts of the record on appeal are required in the District Court for use in the trial of other litigation or for some other reason?" The following comments were made:

Judge Friendly: "Ought not the rule take account of the fact that the part of the record that the district court may continue to need in all likelihood would not be the part that the court of appeals would need?"

Judge Barnes: Made a motion that the rule provide for a list of docket entries together with such other documents as the appellate court desires.

Judge Sobeloff: Leave it to the discretion of the court to decide.

Judge Friendly: Let the parties specify what should be sent up.

The consensus of the Committee was that the rule provide that the papers in the record on appeal in such event shall consist of such papers as are designated by the parties, or directed by the court. If these papers are needed in further litigation in the district court the clerk should send up copies to the court of appeals.

9. When more than one appeal is taken from the same judgment, the rules should provide that a single record shall be transmitted.

10. Several suggestions were made regarding the following question, but no vote was taken: Should provision be made for records on appeal in cases consolidated for trial in the District Court? Vote was "yes."

Mr. Stern: The rule should provide you don't have to certify up to the court of appeals what is already there. The first person gets it up and if it is there then the clerk doesn't have to send it up. The first appellant would send up his whole record; if anyone else wants to go up he sends up what isn't already there -- he sends up just his pleadings.

Judge Barnes: Bring up that which is not duplicated by the first appeal. There would be an incorporation by reference in subsequent appeals.

11. With respect to the reporter's transcript:

a. The rule should put a time limit as to when the transcript shall be filed (25 days) from the time he gets the order, unless he secures an extension from the district court.

b. The rule should fix a time of 10 days within which the appellant must order the transcript from the reporter, and make arrangements for payment.

c. If the appellant orders less than all of the transcript of the trial proceedings, the rule should require him to give the appellee notice of the grounds of his appeal.

d. The form of notice should be formal.

12. In answer to the question: "With respect to the time for transmitting the record to the Court of Appeals: (a) Should the rule adopt the present practice of requiring transmission of the record at any time within the time for its filing, or should transmission be required at some earlier time?" -- the Reporter was instructed to draft this rule in accordance with the direction given him in drafting the Tax Rule.

b. Should the rule fix a time during which the Clerk of the District Court is to retain the record for use of the parties?

Decision of the Committee: Not more than 40 days, but not less than 30, unless requested by the appellant or altered by the court.



13. The rule should not regulate formal matters such as binding, indexing and covering of the original papers comprising the record.

14. The rule should require that the original papers be consecutively numbered prior to transmittal, the regular record and the transcript (already numbered) to be separately numbered; parties to designate regular record by "R" and transcript by "T".

15. The rule should require the parties to transmit all of the original record to the appellate court except by stipulation or order of the court.

16. In response to the question: "Should the rule provide for retention of certain types of exhibits (documents, physical objects, charts and similar matter) by the Clerk of the District Court as custodian for the Court of Appeals unless forwarding is requested by the parties or by the Court of Appeals or its Clerk?" -- the Committee's opinion was:

Everything goes up unless the parties agree that certain objects and certain exhibits should not go up, or the court otherwise directs, but that the place of delivery be left out of the general rule, and be left to the disposition of the several circuits by rule or order.

ITEM D. Filing of the record on appeal

The following questions were submitted to the Committee:

1. Should the provision on time for filing adopt the existing provisions of the Civil and Criminal rules? (40 days plus extensions).

Committee Action: Question previously answered.

2. Should an appellee be permitted to cause the complete record to be filed and the case docketed within the time permitted the appellant?

Committee Action: Yes.

3. What consequences should attach to failure to file the record within the time provided by rule?

(a) Should the Clerk refuse to accept for filing a record presented after the time for filing has expired?

(b) If the appellant fails to effect timely filing, should the appellee be entitled to a binding judgment of dismissal?

(c) Should notice of the motion to dismiss for failure to effect timely filing be given to appellant? If so, how long before presentation of the motion.

Committee Action: The Committee voted "yes" to the first part of question 3(c), but after discussion agreed to leave the problem for consideration later in the meeting. The questions, however, were not considered again.

4. Should the rule regulate the procedure for obtaining additional time for filing the record from the Court of Appeals?

Committee Action: Yes. [Judge Barnes suggested differentiation between record and transcript of testimony]

(a) If so, should it specify the content of an application for extension?

Committee Action: No

(b) If so, what should the content be?

Committee Action: Judge Friendly suggested it should decide whether any application has been made to the lower court and what has been done, and also a brief statement of the reasons for the granting of the application and any previous application to the circuit court. Then if in a particular case the court wanted to inquire into the substantiality of the question it could. No vote was taken but the Reporter made note of the suggestions.

5. Should the filing of a preliminary record be a prerequisite to the filing of an application for extension of time for filing the record?

Committee Action: This is out under our new scheme.

6. Should the rule on filing require the filing of appearances by counsel for the parties?

Committee Action: If the lawyer's name appears on the notice of appeal, appearance will have been entered. Mr. Stern said that it should be specific -- the petition for appeal would give the name of counsel for appellant, and appellee's or other parties' counsel should file something or write a letter saying who he is.

Before recessing for the afternoon, Judge Maris suggested sending out the revised Tax Rule within a week or so in order to give the Bench and Bar at least six months for consideration; submission to the Conference and Court in September, and to the Congress in January when it is not involved with last minute business.

The meeting adjourned for the day at 3:55 p. m.

The meeting was called to order November 17, 1961, at 9:30 a. m.

Dean O'Meara was absent due to a previous commitment, and Mr. Slade, as stated, was ill.

#### ITEM E. Reproduction of relevant parts of the record

The following questions were considered by the Committee:

1. Should the rule require the reproduction of such parts of the record on appeal as the parties desire the court to examine?

Committee Action: Yes. Mr. Stern objects tentatively to the use of the term "reproduction" subject to later discussion of the method of making copies.

2. In what cases should the rule allow an appeal on the trial record without reproduction in any form?

(a) In criminal cases generally?

Committee Action: No

(b) In 28 U. S. C. 2255 and habeas corpus proceedings?

Committee Action: No

(c) In cases where the appellant would otherwise be subject to serious financial hardship?

Committee Action: No

(d) In forma pauperis cases?

Committee Action: No

(e) In any case with leave of the Court of Appeals?

Committee Action: Judge Friendly moved in favor of (e), seconded by Judge Rives, that this should be incorporated in the rule.

3. If it is deemed inadvisable to permit the hearing on appeals without reproduction in any form in any or all of the cases described in 2, immediately above, should the rule permit such cases to be heard on:

(a) Typewritten records?

(b) Copies of the pleadings and transcript?

(c) If so, how many copies should be furnished?

Committee Action: Judge Sobeloff suggested that this item be incorporated with 2(e) above that in any case with leave of the Court of Appeals, subject to any direction of the court as to typewritten or other reproduction number of copies, etc.

The court will determine not only the case but also what it is each court wants.

4. What means of supplying the essential parts of the record on appeal should the rule prescribe:

Committee Action: A single appendix prepared by the parties.

5. Should optional methods of the means of supplying essential parts be provided for? If so, which?

Committee Action: Answered by 4(e) above -- single appendix

6. With respect to the form of reproduction:

(a) What forms should be permitted?

Committee Action: Any form of reproduction to be permitted, so long as it is clear cut, easily readable, distinct, sharply defined, on opaque paper. [The definition of what is acceptable to be worked out by the Reporter]

(b) What of the composition of the "non-printed" (i. e., offset, mimeograph) page?

(1) Should double-spacing be required?

Committee Action: Yes

(2) Should there be a requirement that questions and answers be contained within a single paragraph?

Committee Action: There should be a statement in the rule that permission may be given to parties to have the question and answer in a single paragraph

(3) Should consideration be given to the regulation of the reporter's transcript page?

Committee Action: This was considered not within the province of the Committee

To satisfy Judge Murdock's request for an "escape hatch" Judge Maris suggested there should be a separate rule stating that these rules are applicable in every case, except where the court, on special order, may modify them for particular reasons or for good cause.

7. What should the rule provide with respect to what the reproduced record must contain?

(a) What parts of the record, if any, must be reproduced in every case?

Committee Action: Require printing of the relevant documents in every case. If any part of the opinion or instructions are relevant the whole of them should be printed, except such parts as counsel stipulated, with the approval of the district court, may be omitted.

(b) How should the general requirement of reproduction be formulated?

Committee Action: Adopt the sense of the Sixth Circuit rule which reads "parts of the record . . . which the appellant [parties] deem[s] it essential for the court to read in order to decide those questions."

8. What requirements, if any, should the rule make with respect to the formal arrangement of the reproduced record?

Committee Action: Include table of contents (or index) which must include the names of witnesses and the pages where their testimony appears. Matter reproduced to be set out in the chronological order of occurrence in the district court. Asterisks must be used to indicate omissions in documents or in the testimony of witnesses. Reference to pages of the typewritten transcript of testimony must be made where the printed testimony appears. Index

of exhibits. Regarding the cover it should contain: (a) the name of the court and the number of the case; (b) the title of the case; (c) the nature of the proceeding (i. e., appeal, petition to review or enforce) and the name of the court, agency or board below; (d) the title of the document (i. e., Appendix for Appellant); and (e) the names and addresses of counsel. If the appendix is in a separate volume it should be white [or any other color the Reporter may choose]

9. What time should be allowed for filing the reproduced record?

Committee Action: In ordinary case where joint appendix will come in first, it will be at or before the time of the filing of appellant's brief. When it is permissive -- 20 days after the filing of the appellee's brief.

Should the rule require or permit filing of the reproduced record after the submission of the briefs?

Committee Action: The rule should be permissive.

If so, what provisions should be made for references in the brief to matter appearing in the reproduced record?

Committee Action: When appendix has pagination of original record, and in the brief one refers to this original record pagination.

10. Should the rule authorize the filing of an informal supplement to the formally reproduced record? If so, under what conditions?

Committee Action: Judge Maris suggested if subsequent to the filing of the appendix it appears to counsel that additional portions of the record are required to be read to the judges in order to determine any particular issue, he may submit them.

Judge Barnes suggested he may submit it at time of oral argument.

Mr. Stern: leave it as a possibility without making it mandatory.

Judge Friendly: If you left it out entirely, counsel would still feel free to do it.

Judge Barnes: Advantages of advertising that you can do it are overcome by possibilities of abuse -- he is willing to omit it.

Judge Maris: Agrees if at some point Second Circuit rule is adopted that you are not precluded by the limitations of the appendix.

The answer of the Committee is "No" with one dissenting vote.

11. Should the rule on reproduction of the record permit the use of copies of exhibits in lieu of their formal reproduction in the record?

Committee Action: Yes

(a) Should the use of copies require leave of court, or of the clerk?

Committee Action: No. [be permitted copies without the approval of either court or clerk]

(b) How many copies should be required?

Committee Action: Not less than four.

12. With respect to the sanction to be imposed for unnecessary printing:

(a) Should the rule set out the procedure for requesting imposition of costs on an adverse party for unnecessary printing?

Committee Action: Warning type of rule such as that in the District of Columbia was deemed sufficient.



(c) Should the rule provide for the imposition of costs against the offending counsel?

Committee Action: Yes, the same as in the District of Columbia.

(d) Should the rule attempt to regulate the matter of insufficient printing?

Committee Action: Do nothing officially in the rule.

### In Forma Pauperis

After a full discussion of various problems involved in forma pauperis cases, the Committee referred the whole matter back to the Reporter with the suggestion that he confer with the other Reporters and come up with a tentative draft proposal.

### Tax Rule

Copies of the Reporter's redraft of the proposed rule for review of decisions of the Tax Court were distributed. The following changes were suggested:

1. There was an omission with respect to appeal from two different circuits.
2. The rule should reflect that three notices should be filed when the notice of appeal is filed.
3. Transpose paragraphs (f) and (e) to get the right chronological order.
4. Change the second sentence of the present paragraph (f) to read "After receipt of the docket fee the clerk shall notify the clerk of the Tax Court to transmit the record on appeal, and upon receipt of the record on appeal, the clerk shall enter the case upon the docket and file the record." [New matter underlined] Paragraph (f) should then precede paragraph (e) in the present draft.

5. Paragraph (e) should be revised regarding the transmission of record by making it 25 days to commence running from receipt of notice from the court of appeals to send it up.

6. Change in fourth sentence of paragraph (a) so that it should read: "If a timely notice of appeal is filed by one party; anyother party may take an appeal by filing a notice of appeal within four months after the decision of the Tax Court is entered." [New matter underlined]

7. Change the fifth sentence of paragraph (e) to read: "When more than one notace of appeal is filed, the clerk shall transmit such additional parts of the record as may be requested by any party, notwithstanding any contrary stipulation theretofor made, including such parts as may have been previously retained by stipulation." [New matter underlined]

8. There should be added in paragraph (d) at the end of the first sentence (end of the fourth line) "and shall mail a copy of the notice of appeal to the clerk of the court of appeals."

9. In what will be paragraph (f) (now (e)), in the seventh line, strike out "30" and insert "25.", strike out "the filing of a notice of appeal" and insert the following: "receiving a notice from the clerk of the court of appeals to do so as provided by paragraph (e) of this rule, but the Tax Court may order a shorter time."

10. In paragraph (f), which will be (e), strike out "and upon receipt of the record on appeal the clerk," and add: "the clerk shall notify the clerk of the Tax Court to transmit the record on appeal, shall enter the case upon the docket and upon receipt of the record on appeal shall file it."

The Reporter was directed to redraft the Tax Rule as soon as possible for submission to the members of the Committee. If approved, the proposed Tax Rule will then be transmitted to the standing Committee for circulation to the bench and bar for comment.

A draft prepared by the Reporter incorporating what the Committee did with respect to the record on appeal from district courts (Rule 9) was distributed to the members for their consideration.

The Chairman announced that, subject to the accumulation of sufficient material, the Committee would meet again about the middle of March, with the possibility of another meeting this coming June.

The meeting adjourned at 3:15.