

MINUTES OF THE SEPTEMBER 1967 MEETING OF THE
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The meeting of the Committee on Rules of Practice
and Procedure convened in the Supreme Court Building on
September 12, 1967 at 10 A.M. The following members,
constituting the full membership of the committee, were present:

Albert B. Maris, chairman
George H. Boldt
Peyton Ford
Mason Ladd
James Wm. Moore
J. Lee Rankin
Bernard G. Segal
Charles A. Wright
J. Skelly Wright

Also present were Samuel D. Slade, a member of the
Advisory Committee on Appellate Rules, Professor Bernard J. Ward,
Reporter of the Advisory Committee on Appellate Rules, William
E. Foley, Deputy Director of the Administrative Office and
Secretary of the committee, and Ada E. Beckman, law clerk to
Judge Maris.

The following matters were considered during the meeting:

Agenda Item 1. Federal Rules of Appellate Procedure

The final draft of proposed Federal Rules of Appellate
Procedure, embodying the modifications made by the standing com-
mittee, and the revised Rules 9 and 30 were submitted for consider-
ation. The chairman stated that the first order of business was
consideration of those proposed rules which required the action
of the standing committee. Since the proposed appellate rules
cover appellate procedure now covered in part by certain of the
present civil and criminal rules, the next order of business

would be consideration of the action required to eliminate such duplication.

Professor Ward made a general explanation of the changes in the prior draft which the advisory committee had made. The committee then proceeded to consider those rules in which changes have been made which the committee has not heretofore approved.

Rule 4. Appeal as of right-when taken

Professor Wright questioned the reference to "government" as a party in subsection (b) whereas "United States" is used in subsection (a). He believed there was a lack of conformity in the Rule. Professor Ward answered that the word "government" in subsection (b) is proper and that if "United States" was substituted an ambiguity would be created. Both Mr. Segal and Judge Maris suggested that "government" was sufficient.

The committee approved the rule as drafted.

Rule 6. Appeals by allowance in bankruptcy proceedings

Professor Moore does not believe it is wise to refer to section numbers of the Bankruptcy Act because there is always the possibility that Congress will amend the Act changing the numbers or adding other sections. Professor Ward stated that deleting the reference to sections of the Act would create ambiguities, since the reader of the rule might not be alerted to special proceedings. A general discussion followed.

The committee approved the rule as drafted.

Rule 9. Release in criminal cases

This rule had been recommitted to the advisory committee to be redrafted in the light of the provisions of the Bail Reform Act of 1966 which the advisory committee had not previously had an opportunity to consider. The committee gave thorough consideration to the revised rule.

Judge Boldt moved that the caption in Rule 9(a) be amended to read "(a) Appeals from orders respecting release entered prior to judgment of conviction."

The motion was carried and the amendment was adopted.

Judge Boldt then moved that a new first sentence be added to Rule 9(b) and that the present first and second sentences of the rule be amended to read:

"Application for release from a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. . ."

The motion was carried and the amendment was adopted.

The rule was approved as amended.

Rule 23. Custody of prisoners in habeas corpus proceedings

The form in which this rule had been approved by the committee did not include subsection (d), Modification of Initial Order Respecting Custody, which was added by the advisory committee to conform Rule 23 to Supreme Court Rule 49, as adopted

June 12, 1967, effective October 2, 1967. Judge Maris suggested that Rule 23 should follow the Supreme Court Rule.

The rule was approved as amended.

Rule 28. Briefs.

Judge Maris suggested that the word "transcript" be inserted in the fifth sentence of subsection (e) in lieu of "record", the sentence to read as follows:

"If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected."

The committee agreed.

The rule was approved as amended.

Rule 30. Appendix to the briefs.

This rule relates to the manner in which the pertinent parts of the record on appeal should be prepared for the use of the appellate judges. At the September 1966 meeting it was decided that the draft of Rule 30 prepared by the advisory committee, together with two alternative drafts, one providing for the separate appendix system and the other for the system now in use in the Ninth Circuit, should be submitted to the bench and bar for their further consideration and comments. After considering these comments, the advisory committee has prepared a revised Rule 30. Mr. Slade, acting for Judge Prettyman who was unable to be present, presented the changes made by the advisory committee in Rule 30.

The committee fully considered Rule 30. Judge Boldt moved that the final phrase in the first sentence of the second paragraph of subsection (b) be deleted, that sentence to read as follows:

"Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts."

The motion was unanimously adopted.

A motion was made that the following two sentences be substituted for the first sentence appearing in subsection (c):

"If the appellant shall so elect, or if the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. Notice of such election by the appellant shall be filed with the clerk within 10 days."

The motion was carried.

Mr. Segal moved that subsection (f) be amended to read as follows:

"A court of appeals may by rule for all cases or for classes of cases or by order in specific cases dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require."

The motion was carried.

The rule was approved as amended. (Vote: 8 to 1)

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

Since Rule 30 now provides for the filing of the appendix the committee approved a motion that all provisions relating to the appendix be deleted from Rule 31. Accordingly, it was agreed

that the caption should read: "Rule 31. Filing and Service of Briefs."

It was agreed that subsection (b) "Time for serving and filing the appendix" should be deleted.

Subsection "(c)" was redesignated "(b)" and the second sentence was deleted as was the phrase "or appendix" in the third sentence, so that the subsection would read as follows:

"(b) Number of Copies to be Filed and Served. Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented."

Subsection "(d)" was redesignated "(c)" and the phrase "or Appendix" was deleted from the caption and the phrase "or the appendix" from the first sentence.

The committee suggested that the Reporter conform the advisory committee's note accordingly.

The rule was approved as amended.

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

Judge Maris suggested that the color of the cover of an appellant's brief be blue instead of yellow and that the color of the cover of an appellee's brief be red instead of blue.

The chairman was authorized to make these changes in the rule and it was approved.

Rule 34. Oral Argument.

Judge Maris suggested that the 45 minutes provided in

the rule for oral argument be changed to read 30 minutes. Mr. Segal opposed the suggestion. Professor Wright moved that the original provision for 30 minutes be restored, the 30 minutes time having appeared in the rule as it was originally presented to the committee in September 1966. Mr. Rankin moved that the rule provide for 30 minutes argument on each side and that any party may apply for an additional 15 minutes which shall be granted. Judge Boldt moved that the phrase "for cause" be added to the amendment proposed by Mr. Rankin. Judge Wright moved as a substitute that the proposed rule be amended to provide 30 minutes for each side for oral argument and that additional time shall be liberally granted if cause is shown therefor. Professor Wright agreed. Full discussion of the proposed amendments followed. The committee finally unanimously agreed that subsection (b) of Rule 34 be amended to read as follows:

"(b) Time Allowed for Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary."

The rule was approved as amended.

Form 2. Notice of Appeal for Review of a Decision of the Tax Court. This form appears in the Appendix of Forms, and

the caption was amended to read as follows:

"Form 2. Notice of Appeal to a Court of Appeals from a Decision of the Tax Court."

The form, as thus amended, was approved.

Upon concluding its review of the proposed Federal Rules of Appellate Procedure the committee expressed its admiration and gratitude for the excellent work of the Advisory Committee on Appellate Rules under the leadership of its chairman, Judge Prettyman, and of its gifted reporter, Professor Ward, in bringing this project to so satisfactory a completion.

Agenda Item II. Action required with respect to other rules.

(a) Federal Rules of Civil Procedure

The standing committee approved the following changes in the Federal Rules of Civil Procedure:

Rule 6(b). Strike out the reference to "73(a) and (g)".

Rule 9(h). Admiralty and Maritime Claims.

Professor Moore moved that the following sentence be added at the end of the section:

"The reference in Title 28, U.S.C., § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)."

The addition of this sentence to Rule 9(h) transfers to that rule the substance of subsection (h) of Rule 73 which preserved the right to an interlocutory appeal in admiralty cases which is provided by 28 U.S.C. § 1292(a)(3).

The motion was carried.

Judge Maris suggested that "73(h)" be deleted from Rule 9(h), thus eliminating reference to Rule 73 which must be abrogated upon adoption of the appellate rules.

This was approved.

The committee approved the addition of the sentence and the deletion of "73(h)".

Rule 41. Dismissal of Actions.

Judge Maris suggested that an inadvertent error appearing in Rule 41(a)(1) be corrected. When Civil Rule 23 was amended in 1966, former subsection (c) became subsection (e). Inadvertently, Rule 41(a)(1) was not then amended to show the change.

The committee approved the amendment.

Rules 72, 73, 74, 75 and 76.

These are the civil rules relating to appeals, the provisions of which are being transferred to and covered by the Federal Rules of Appellate Procedure and in the case of Rule 72 by the Rules of the Supreme Court. Judge Maris suggested that these rules be abrogated.

The committee approved the abrogation of these rules.

Rule 77(d).

Judge Maris suggested that the words "Rule 73(a)" be deleted from the last sentence of subsection (d), since the provisions of Rule 73(a) are to be incorporated into Rule 4(a) of the appellate rules, and that the words "Rule 4(a) of the Federal Rules of Appellate Procedure" be substituted in lieu thereof.

The amendments were approved by the committee.

Rule 81. Applicability in General.

Since reference are made in Rule 81(a)(1), (2) and (3) to appellate procedure, Judge Maris suggested that the committee approve the following amendments: That the phrase "except to appeals therein" which appears at the end of paragraph (1) be deleted; that paragraph (2) be amended to read: "(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions"; and that in the second sentence of paragraph (3) the number "(1)" be deleted and the phrase following the last comma ", and (2) to appeals in such proceedings" be deleted.

The committee approved the amendments.

Form 27. Notice of Appeal to Court of Appeals under Rule 73(b)

Since the form of notice of appeal is to be transferred to the Federal Rules of Appellate Procedure as Form 1, Judge Maris suggested that Form 27 be abrogated.

The committee approved.

(b) Federal Rules of Criminal Procedure.

The committee approved the following changes in the Federal Rules of Criminal Procedure:

Rules 37, 38(b) and (c), and 39.

Subsections (b) and (c) of Rule 37 are covered by the Rules of the Supreme Court. Rules 37(a), 38(b) and (c), and 39 relate to appellate procedure which is to be covered by the Federal Rules of Appellate Procedure. Judge Maris suggested the abrogation of these rules. The committee approved their abrogation.

Rule 45. Time.

Judge Maris suggested that the "37(a)(2) and 39(c)" be deleted from subsection (b) of Rule 45 since Rules 37 and 39 are to be abrogated. This was approved.

Rule 49. Service and Filing of Papers.

Judge Maris suggested that the words "Rule 37(a)(2)" be stricken from the end of the last sentence of subsection (c) and the words "Rule 4(b) of the Federal Rules of Appellate Procedure" be inserted in lieu thereof. This was approved.

Rule 56. Courts and Clerks.

Judge Maris suggested that the words "court of appeals and the" be deleted from the first sentence of the rule since the matter is covered in Rule 45 of the Federal Rules of Appellate Procedure. The committee approved.

Rule 57. Rules of Court.

Judge Maris suggested that in subsection (a) the words "and courts of appeals" be deleted from the first sentence and the words "or by a court of appeals" be deleted from the second sentence, since the provisions relating to courts of appeals are included in Rule 47 of the Federal Rules of Appellate Procedure. The committee approved.

Forms 26 and 27.

Form 26, Notice of Appeal, and Form 27, Statement of Docket Entries, relate to appellate procedure and no longer appropriate in the Federal Rules of Criminal Procedure. Judge Maris suggested that these forms be abrogated. The committee approved abrogation of these forms.

Professor Wright moved that the chairman and the reporter be authorized to change the language in the proposed rules and the amendments thereto if found necessary to clarify the meaning intended. The motion was carried.

Final Action

The committee authorized the chairman to submit to the Judicial Conference the complete draft of uniform appellate rules as thus approved, together with the notes of the advisory committee thereto, as well as its action with respect to the rules embodied in the Federal Rules of Civil and Criminal Procedure which require amendment or abrogation in the light of the proposed Federal Rules of Appellate Procedure. The committee recommended that the Judicial Conference approve the draft of Federal Rules of Appellate Procedure thus submitted, together with the proposed action with respect to certain of the Federal Rules of Civil and Criminal Procedure. The committee further recommended that the Judicial Conference transmit these rules and amendments to the Supreme Court with the recommendation that the Supreme Court adopt these rules, effective July 1, 1968, under the authority granted the Court by 18 U.S.C. § 3772 and 28 U.S.C. § 2072, as amended, and § 2075.

Agenda Item III. Advisory Committee progress reports.

Judge Maris reported that he had attended most of the meetings of the advisory committees during the past year and that Professors Moore and Wright had also attended many of them.

Judge Maris reported that the Advisory Committee on Civil Rules had approved a draft of revised rules relating to depositions and discovery which is now being prepared for the printer and which will soon be ready for distribution to the bench and bar for their consideration, comments and suggestions.

Professor Moore reported that the Advisory Committee on Bankruptcy Rules was continuing intensive work on its projects and that it is making excellent progress. Professor Wright also reported on the progress of this advisory committee.

Judge Maris reported that the Advisory Committee on Rules of Evidence is continuing intensive work on its task of preparing a comprehensive draft of rules.

Judge Maris reported that the Advisory Committee on Criminal Rules, with the assistance of its newly appointed reporter Frank J. Remington, is continuing its study of various phases of the rules not heretofore fully dealt with. A meeting of the advisory committee was in progress during the session of this committee.

Judge Maris reported that the Advisory Committee on Admiralty Rules is continuing its study of the effect in practice of the amended civil rules in their relation to maritime litigation, as well as the preparation of amendatory legislation to bring existing statutory law into harmony with the new provisions of the civil rules relating to admiralty litigation.

Professor Wright moved that the committee recommend to the Chief Justice that a reporter be appointed to succeed the advisory committee's deceased reporter, Professor Brainerd Currie. The motion was carried and Judge Maris was authorized to present this recommendation to the Chief Justice.

Agenda Item IV. Courtroom Photography and Broadcasting.

The Judicial Conference at its March 1967 session, Rept. p. 15, referred to the standing committee the resolution adopted by the Judicial Conference of the Ninth Circuit at its 1966 meeting, which provides the following:

"Resolution: Re: Courtroom Photography and Broadcasting

"The Judicial Conference of the Ninth Circuit recommends to the Advisory Committees on Criminal and Civil Rules and to the United States Judicial Conference that rules of procedure be adopted which would provide in substance, as follows:

"The taking of photographs in the courtroom or its environs or the broadcasting therefrom by radio, television or other means during the course of, or in connection with, any judicial proceedings, whether the court is actually in session or not, is prohibited.

"The district courts by local rule or order shall define the area included as environs."

The committee discussed the proposal. Judge Maris read Criminal Rule 53, regulation of conduct in the court room, which provides.

"The taking of photographs in the court room during the progress of judicial proceedings or radio broad-

castings of judicial proceedings from the court room shall not be permitted by the court."

Judge Maris also read the resolution adopted by the Judicial Conference at its March 1962 session, Rept. pp. 8-9.

The committee felt the need for more time to study the subject and it was agreed that further consideration of the proposal should be postponed to the next meeting.

There being no further business, the meeting was adjourned at 5 P.M., subject to the call of the chairman.

William E. Foley
Secretary, Committee on Rules
of Practice and Procedure