Ward's Corrections

DRAFT

MINUTES OF THE SEPTEMBER 1966 MEETING OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The seventh meeting of the standing Committee on Rules of Practice and Procedure convened in the Supreme Court Building, Washington, D. C., on September 7, 1966 at 10:00 a.m.

The following members were present:

Albert B. Maris, Chairman
George H. Boldt
Mason Ladd
James W. Moore
J. Lee Rankin
Bernard G. Segal
Charles A. Wright
J. Skelly Wright

Mr. Peyton Ford was unavoidably absent.

Others attending the meeting were Professor Bernard J. Ward, Reporter for the Advisory Committee on Appellate Rules, Warren Olney III, Director of the Administrative Office; and William E. Foley, Deputy Director of the Administrative Office and Secretary to the Rules Committees.

Judge Maris called the meeting to order at 10:00 a.m. and stated the first item of business would be the consideration of the report of the Advisory Committee on Appellate Rules, which had been circulated in advance of the meeting to the members of the standing Committee. The Chairman also reviewed for the members the status of the proposed legislation, S. 3254, and stated that it was his understanding that Congressman Celler intended to bring the bill up before House Subcommittee No. 5

at its next meeting. It was felt that the legislation might be acted upon by October. Judge Maris stated that until this legislation is passed there is no destination for the rules, unless possibly suggesting that some of them be adopted by the courts themselves, but that all of the rules could not be adopted by the courts of appeals because some rules are beyond their power.

The Committee was faced with the decision of whether, if the legislation is not passed before the Judicial Conference, to forward the proposed rules to the Conference at its scheduled meeting for September 22, 1966. Judge Maris felt that a proposal should not go forward until after there is legislative authority and that it would be better to hold the report until that time as any question or argument about a proposal might slow down the legislative process.

It was the consensus of the Committee that it should proceed to consider the report of the proposed appellate rules with a view of forwarding it to the September 1966 session of the Judicial Conference with the recommendation that it be approved and transmitted to the Supreme Court as and when the Enabling Act is passed.

I. CONSIDERATION OF THE APPELLATE RULES

The Chairman announced that each rule would be considered individually and that the Advisory Committee Reporter, Professor

Ward, would give a brief history of each of the proposed rules so that there would be full consideration of each and ample opportunity for any questions desired.

Proposed Rule 1. Scope of Rules.

The rule was approved as drafted.

Proposed Rule 2. Suspension of Rules.

Mr. Rankin stated that he did not like this rule as he felt it provides that the court, at its pleasure, can set aside any of the other rules. Judge Maris stated the difficulty is that under the present practice the court is setting aside its own rules and it has that power, but that the proposed rules are being prescribed by the Supreme Court and the courts of appeals would not have the power to set aside the provisions of these rules unless there is some saving clause of this nature. He further stated that this rule would serve as a safety valve inasmuch as there is anticipated a certain amount of dissention to the uniform rules. Judge Wright concurred with Mr. Rankin in his view of the rule. Discussion ensued on the matter and the Committee approved the rule with several minor amendments as subsequently stated:

> Insertion of the words "of any" after the word "provisions" in the fourth line of Rule 2. Insertion of the words "in a particular case" after the word "rules" in the fourth line and deletion of the words "upon any matter before it" in the first line.

The rule was approved as amended.

Proposed Rule 3. Appeal as of Right -- How Taken.

Dean Ladd inquired about the sentence in subdivision (d) stating that the defendant shall receive a copy of the notice of appeal. Professor Ward stated this had been suggested by Judge Rives and the Committee had instructed him to contact Dean Barrett, Reporter of the Advisory Committee on Criminal Rules, to get his reaction. Dean Barrett had thought the suggestion good. He stated the purpose as being (1) the defendant will know the appeal has been entered and (2) in Rule 32(a)(2) of the Civil Rules, as amended in 1966, the defendant in open court can say he would like to have an appeal taken and it is the duty of the court to file the notice, whereby the defendant will then get a copy showing that the clerk has filed the appeal.

The rule was approved as drafted.

Professor Wright then inquired if he was correct in his assumption that as part of the recommendation of the standing Committee to the Judicial Conference that Rules 73-76 of the Civil Rules and Rules 37-39 of the Criminal Rules would be recommended for repeal since they obviously cover the same ground. He also inquired whether there is anything in the Appellate Rules to carry out Civil Rule 73(h), the interlocutory appeals in admiralty and maritime cases. Professor Ward stated that no provision had been made in the Appellate Rules to carry that over. He further stated the Advisory Committee did not agree with the recommendation

of the Admiralty Committee on the necessity of Rule 73(h) when the rule was drafted, but he did think Professor Wright had a point, i.e., by sub silentio throwing out the idea that interlocutory appeals in admiralty endure. The members felt the action of the Admiralty Committee may now oblige the Appellate Committee to include something in their rules.

Discussion ensued on the necessity of Rule 73(h). Professor Wright said he could understand the desire of the Admiralty Committee to preserve their interlocutory appeals but since these rules do not deal with appealability he thought appealability could remain as it had been. Professor Ward felt the problem could be cured by stating that on reconsideration the Committee felt that Rule 73(h) stated the obvious to the effect that the rules are not concerned with appealability.

Discussion continued on whether Rule 73 should be repealed in its entirety and it was the feeling of some of the members that it should not be inasmuch as it had just been included in the rules. Professor Wright made a suggestion that all of Rule 73 except subdivision (h) be repealed but Professor Ward thought this would be confusing. A suggestion was made that if the Admiralty Committee is to continue to function it might review this matter. The Committee concluded that it would leave the matter to the Admiralty Committee to work out.

The rule was approved as drafted.

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

Professor Wright stated he thought there is an ambiguity about the phrase in the first paragraph of subdivision (a) which states that "if the United States or an officer or agency thereof is a party" in regard to cases where the United States is purely a nominal party. Professor Ward stated that there had been ~~a little difficulty~~ questions raised troublesome in the Miller Act cases and there was a Fifth Circuit decision on the question but he did not think the proposed rule contained any substantial ambiguity. Professor Wright wondered if there had been enough trouble in the Fifth Circuit to warrant a sentence in the Note. Professor Ward stated that in his opinion it was not needed and Professor Wright said he did not wish to prolong the matter.

The rule was approved as drafted.

Proposed Rule 5. Appeals by Permission Under 28 U.S.C. § 1292(b).

The rule was approved as drafted.

Proposed Rule 6. Appeals by Allowance in Bankruptcy Proceedings.

Professor Moore inquired whether it would not be better to phrase subdivision (a) in general terms without specific references to sections of the Bankruptcy Act, and to discuss the sections of the Act in the Note inasmuch as some of these sections may change as Congress quite frequently amends the Act. Professor Ward stated this had been considered by the Advisory Committee but that the Committee had decided the rule is little used and should be

specific in order to be clear to the practitioners. He also pointed out that the Civil Rules frequently refer to the Act. Professor Moore said he felt this is a weakness in the civil rules but stated he did not wish to stress the matter.

The Rule was approved as drafted.

Proposed Rule 7. Bond for Costs on Appeal in Civil Cases.

The rule was approved as drafted.

Proposed Rule 8. Stay or Injunction Pending Appeal.

Professor Wright raised a question as to whether it was necessary to be so explicit in subdivision (b) or whether a single statement such as "proceedings against sureties shall be in accordance with Rule 65.1 of the Rules of Civil Procedure" would be sufficient. Professor Ward stated that the Advisory Committee did not like cross-references and wanted each rule to be self-contained. Discussion ensued, after which the Committee approved the rule as drafted.

Proposed Rule 9. Bail.

Judge Wright suggested that in light of the Bail Reform Act of 1966 this rule should be reviewed and given thorough consideration to see that any provision contained therein is not contrary to the Act. Discussion ensued and the Committee decided this should be done. Professor Wright said he would be glad to prepare a redraft during intermission. [The redraft was presented later in the day, but the Committee decided that in view of other action taken during the day, the rule should be recommitted to the Reporter for further study.]

Proposed Rule 10. The Record on Appeal.

The rule was approved as drafted.

Proposed Rule 11. Transmission of the Record.

The Committee gave thorough consideration to this rule and particularly to subdivision (b) concerning the duty of the clerk to transmit the record. Professor Ward explained the different methods allowed by the rule and also went into detail about the method used by the Ninth Circuit. Some members thought it was unnecessary to ask the clerk of the district court to number the pages of the record. Mr. Segal moved adoption of Judge Maris' suggestion for the second and third sentences, i.e., the second sentence of subdivision (b) to read:

> The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness.

The third sentence is to be deleted. The motion was carried.

Rule 11 was approved as amended.

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

Judge Maris called attention to a minor detail that the vote in the Advisory Committee was to provide that the style of cases in the courts of appeals should follow the style in the district courts as it was felt the district court style had many advantages. This provision puts in that if the name of the appellant and appellee does not appear in the title then the

appeal should be docketed under their names with the appellant first, which, in effect, is to deny the rule in every case except in the ordinary law suit. He suggested the fourth sentence of subdivision (a) be revised to read:

> An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant his name shall be added to the title and so designated.

The proposal was adopted.

Rule 12 was approved as amended.

Proposed Rule 13. Review of Decisions of the Tax Court.

Professor Ward stated the background history and explained why ~~the~~ these provisions ~~of Title III~~ had been incorporated as Title III of the proposed ~~in this~~ rules. Judge Maris submitted a suggestion about the time for appeals to bring it in line with the Civil practice in the ordinary civil actions. Discussion ensued concerning the number of days allowed for filing a notice of appeal for review of a decision of the Tax Court and after consideration of the rule the Committee approved it as drafted, except that the period of time should be stated in days rather than months, i.e., line five should read 90 days and line eight should read 120 days.

Proposed Rule 14. Applicability of Other Rules to Review of Decisions of the Tax Court.

Professor Ward explained the background of the rule and it was approved as drafted.

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

Professor Ward explained the proposed rule and the Committee felt that the clause in the 11th line of subdivision (a), "Unless an applicable statute prescribes the content of the petition for review," did not serve any useful purpose. Dean Ladd moved its deletion and the Committee agreed. The sentence,as amended, will read:

> It shall be sufficient if the petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed.

The rule was approved as amended.

Proposed Rule 16. The Record on Review or Enforcement.

The rule was approved as drafted.

Proposed Rule 17. Filing of the Record.

The rule was approved as drafted.

Proposed Rule 18. Stay Pending Review.

The rule was approved as drafted.

Proposed Rule 19. Settlement of Judgments Enforcing Orders.

The rule was approved as drafted.

Proposed Rule 20. Applicability of Other Rules to Review or Enforcement of Agency Orders.

The rule was approved as drafted.

Proposed Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs.

The rule was approved as drafted.

Proposed Rule 22. Habeas Corpus Proceedings.

The second sentence of subdivision (a) was questioned as to the matter of a writ of habeas corpus being made to the court of appeals since a court of appeals does not have authority in this matter - it is the circuit judge who has the power. It was suggested that a sentence be added in the Note to say that an application which is addressed to a court of appeals is being considered as addressed to the judge thereof. Discussion ensued and the Committee decided to revise the second sentence of subdivision (a) to read:

> If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court.

It was pointed out that this terminology would also apply to the rules regarding in banc and perhaps to other rules which the Reporter should revise in accordance. It was the consensus of the Committee that an addition should be made to the Note to explain the procedure.

The rule was approved as amended.

Proposed Rule 23. Custody of Prisoners in Habeas Corpus Proceedings.

Professor Ward explained the background of this rule and stated it had been considered at length. He stated that when the rule had been circulated in the Preliminary Draft several

comments were received saying the rule was unclear. In the meantime the Supreme Court had asked the Advisory Committee on Appellate Rules to study Supreme Court Rule 49, which was done, and recommendations were made to the Supreme Court resulting in the proposed rule. He further stated that the Advisory Committee is satisfied that the proposed rule is consistent with history and the desirable practice in this regard. This rule, however, is not identical to the Supreme Court Rule. Professor Ward thought the logical thing to do would be to adopt the proposed rule and hope the Supreme Court would abrogate Rule 49 and substitute the proposed rule. He stated he hoped that any transmittal letter to the Supreme Court would mention this fact because the proposed rule, if adopted, will be in conflict with Supreme Court Rule 49.

The rule was approved as drafted.

Proposed Rule 24. Proceedings in Forma Pauperis.

This rule was approved as drafted.

Proposed Rule 25. Filing and Service.

This rule was approved as drafted.

Proposed Rule 26. Computation and Extension of Time.

This rule was approved as drafted.

Proposed Rule 27. Motions.

Professor Ward stated that at the last Advisory Committee meeting Judge Rives had presented a forceful argument as to

the desirability of a
~~whether the~~ rule gives a single judge of the court of appeals
power to grant any intermediate ~~immediate~~ relief. ~~in terms of giving~~ him
to add the subdivision (c) which appears in the final draft.
~~power to do anything that can be done by motion~~. Discussion ensued and Judge Maris inquired whether this should apply to a single motion or certain classes of motions. It was the decision of the Committee that subdivision (c) should be revised to allow for classes of motions as follows:

> In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

The rule was approved as amended.

Proposed Rule 28. Briefs.

Mr. Stern had submitted a suggestion for a slight modification in subdivision (d) in the last sentence, that the words "actual names" be added before the word "or" to read:

> It promotes clarity to use either the designations used in the lower court or in the agency proceeding

actual names or descriptive terms such as "the employee," "the insured person," "the taxpayer," "the ship," "the stevedore," etc.

The suggestion was accepted. Judge Maris' suggestion for numbering the documents comprising the record, which was adopted for Rule 11 would also apply to this rule and the second and third sentences of subdivision (e) would read as follows:

> If the record is reproduced in accordance with the provisions of Rule 30(f) or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used.

The word "transcript" should be inserted in the fourth sentence in lieu of "record."

The rule was approved as amended.

Proposed Rule 29. Brief of an Amicus Curiae.

The rule was approved as drafted.

Proposed Rule 30. Reproduction of Necessary Parts of the Record.

Professor Ward gave the background of this rule and discussion ensued on the suggestion submitted by Mr. Stern to change the word "must" in subdivision (a), item (4) as he did not feel the rule should say what the judge must read. The Committee approved the following terminology for subdivision (a), item (4).

(4) such other parts of the record as it is deemed essential for the judges to read in order to determine the issues presented.

The three methods for reproduction of the record allowed by the proposed rule were discussed and some members stated opposition inasmuch as it was felt the rule should prescribe a uniform method rather than permitting several methods to be used. Inquiry was made as to whether the Ninth Circuit practice was considered for the rule generally and Professor Ward replied that the Advisory Committee had considered it but felt it was too new. ~~Further that the consensus of the Advisory Committee was that people might rival at it and that any opposition might be undercutting to the uniform rule.~~ Discussion ensued as to whether all circuits could cope with the Ninth Circuit practice, particularly in circuits with large volumes of cases. One suggestion made was rather than allow three methods by the proposed rule to allow the circuits to use any method desired.

After thorough consideration of the proposed rule, Mr. Rankin moved that the rule allow the choice of any one of the four methods, i.e., the ordinary method prescribed by the proposed rule, the alternative method of deferred appendix, the optional method used by the Ninth Circuit, or the separate appendix system. Judge Wright, however, preferred a uniform method, and after further consideration Mr. Rankin's motion did not receive a second.

Mr. Segal then moved that the standing Committee circulate Rule 30 to the bench and bar as being the recommendation of the Advisory Committee on Appellate Rules, asking for comments of

the country, in the usual way, with the restriction that all comments must be in the hands of the Reporter by August 10, 1967, and that accompanying the recommendation of the Advisory Committee would be a proposed rule drafted in accordance with the Ninth Circuit Plan and a third proposed rule drafted in accordance with the separate appendix plan. Professor Moore seconded Mr. Segal's motion and it was unanimously adopted.

The Committee further unanimously concluded that the action of this Committee be held confidential until after the House acts unless in the opinion of the Chairman of this Committee it has become apparent the House will not act.

Professor Wright inquired whether, under the resolution, the Reporter will also prepare notes to go with the two alternative rules, making a case for those just as he had done for the proposed rule. This was approved.

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

The only question concerning this rule was whether in subdivision (c) the required number of copies should be 25. Professor Ward stated the Committee had given consideration to this and decided that 25 copies should be required as on occasion the judge needs extra copies for his law clerk, him home, and that often libraries request copies. The Committee felt that the court should have power to order a lesser number and the

sentence was revised to read:

Twenty-five copies of each brief ~~unless the~~ shall be filed with the clerk, unless the court by order ~~otherwise a lesser number~~ directs a lesser number ~~shall direct~~ in a particular case, ~~shall be filed with the clerk~~ . . . .

The rule was adopted as amended.

Proposed Rule 32. Form of Briefs, The Appendix and Other Papers.

The Committee considered the matter of colored covers for the briefs and several arguments were presented for as well as against them. One argument was that the rule should not definitely state the covers shall be of certain colors because of the seriousness of the situation if a printing company should inadvertently use the wrong color and there was not time to rectify the situation. After discussion of the matter it was decided that in the third line of the second paragraph of subdivision (a) the word "should" would be inserted in lieu of "shall."

The rule was approved as amended.

Proposed Rule 33. Prehearing Conference.

The rule was approved as drafted.

Proposed Rule 34. Oral Argument.

Judge Maris made a suggestion that the time for argument be increased to 45 minutes. Discussion ensued and Professor Ward pointed out that five of the circuits in the last few years have by local rule reduced the time for oral argument to 30 minutes. Several of the members still were of the opinion that 45 minutes

should be allowed and Mr. Segal moved that the period of 45 minutes for oral argument be restored. The motion was seconded and carried by a vote of 4 to 3. The rule was approved as amended.

Proposed Rule 35. Determination of Causes by the Court in Banc.

The rule was approved as drafted.

Proposed Rule 36. Entry of Judgment.

The rule was approved as drafted.

Proposed Rule 37. Interest on Judgments.

The rule was approved as drafted.

Proposed Rule 38. Damages for Delay.

The rule was approved as drafted.

Proposed Rule 39. Costs.

Judge Maris pointed out that this rule involves recent statutes which permit costs in civil suits hereafter brought for and against the United States and that the Reporter had modified subdivision (b) in this regard. He further stated that this would take effect gradually as it applies only to suits brought after the statute was passed and not to pending civil suits.

Professor Ward stated he would like for the record to show that subdivision (c) includes costs of briefs and copies of records which are now taxable costs. Under the old system the costs of briefs were not taxable costs.

The rule was approved as drafted.

Proposed Rule 40. Petition for Rehearing.

The rule was approved as drafted.

Proposed Rule 41. Issuance of Mandate; Stay of Mandate.

The rule was approved as drafted.

Proposed Rule 42. Voluntary Dismissal.

The rule was approved as drafted.

Proposed Rule 43. Substitution of Parties.

The rule was approved as drafted.

Proposed Rule 44. Cases Involving Constitutional Questions Where United States is Not a Party.

The rule was approved as drafted.

Proposed Rule 45. Duties of Clerks.

The rule was approved as drafted.

Proposed Rule 46. Attorneys.

Mr. Segal stated he was bothered by subdivision (b) as it did not require a hearing for suspension or disbarment, and suggested that the phrase "and after hearing is requested" be inserted in the last sentence of subdivision (c) after the word "cause" to read:

> Upon his response to the rule to show cause and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

The same phrase was suggested for subdivision (c) to be inserted after the word "contrary" to read:

> A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar for failure to comply with these rules or any rule of the court.

The rule was approved as amended.

Proposed Rule 47. Rules by Courts of Appeals.

The rule was approved as drafted.

* * *

The Committee decided that in view of the action taken today on Rule 30 it would not be feasible to send the appellate rules to the Judicial Conference at this time.

II. Progress Reports of the Advisory Committees.

The Committee accepted the reports submitted by the Advisory Committees on Bankruptcy, Civil, Criminal and Evidence Rules.

III. Future Work of the Admiralty Committee

Judge Maris reviewed the status of the Admiralty Committee and asked the members for their views regarding the continuance of this Committee to study the admiralty rules which were bended

into the Civil Rules and to evaluate the results of the practice under the uniform rules.

Judge Wright questioned the soundness in continuing the Admiralty Committee as he felt the responsibility for the rules should now lie with the Civil Committee. Judge Maris pointed out that there were provisions of the admiralty practice which the Committee had not felt feasible to consider before merging with the Civil Rules and these procedures were so specialized that he felt the Civil Rules Committee could not take care of them. Judge Wright stated that he understood this but hoped in the future that additional members could be added to the Civil Committee so that all matters could be handled under the auspices of the Civil Rules Committee.

Judge Boldt moved that the Chairman of the standing Committee, in appropriate form, recommend to the Judicial Conference that the Admiralty Rules Committee be continued for another term. The motion was discussed, duly acted upon, and adopted.

IV. Approval of the Rules for the Tenth Circuit Court of Appeals

Judge Maris stated the United States Court of Appeals for the Tenth Circuit had revised its rules and had sent them to the standing Committee for approval and transmittal to the Judicial Conference. The Tenth Circuit Rules were considered, approved, and will be recommended to the Judicial Conference for approval.

* * *

There being no further business, the meeting was adjourned at 4:40 p.m.