

BEST AVAILABLE COPY

**MINUTES OF THE JUNE 1965 MEETING OF THE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The sixth meeting of the standing Committee on Rules of Practice and Procedure convened in the Supreme Court Building, Washington, D. C., on June 28, 1965, at 10:00 a. m.

All of the members of the standing Committee were present:

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

Others attending the meeting were Senior Judge Walter L. Pope, Chairman of the Advisory Committee on Admiralty Rules; Professor Brainerd Currie, Reporter for the Advisory Committee on Admiralty Rules; Honorable Dean Acheson Chairman of the Advisory Committee on Civil Rules; Professor Benjamin Kaplan, Reporter for the Advisory Committee on Civil Rules; Professor Maurice Rosenberg, Director of the Columbia University Project for Effective Justice; Senior Judge Phillip Forman, Chairman of the Advisory Committee on Bankruptcy Rules; Professor Frank R. Kennedy, Reporter for the Advisory Committee on Bankruptcy Rules; Judge John C. Pickett, Chairman of the Advisory Committee on Criminal Rules; Dean Edward L. Barrett, Jr., Reporter of the Advisory Committee on Criminal Rules;

Senior Judge E. Barrett Prettyman, Chairman of the Advisory Committee on Appellate Rules; Professor Bernard J. Ward, Reporter of the Advisory Committee on Appellate Rules; Mr. Albert E. Jenner, Chairman of the Advisory Committee on Rules of Evidence; Mr. W. Brown Morton, member of the Advisory Committee on Civil Rules; Mr. Will Shafroth, Secretary of the Rules Committees; and Mr. William E. Foley, Deputy Director of the Administrative Office of the United States Courts.

The following matters were considered during the meeting:

Agenda Item 1. Secretary of Committees

The standing Committee accepted the resignation of Mr. Will Shafroth, Secretary of the Rules Committees, and expressed its appreciation for his service rendered to the Committees. Mr. William E. Foley, Deputy Director of the Administrative Office, was appointed to succeed Mr. Shafroth as Secretary.

Agenda Item 2. Unification of Civil and Admiralty Procedure

Judge Pope, Chairman of the Advisory Committee on Admiralty Rules, presented the report of the Committee stating the first task undertaken was to decide whether unification was desirable and feasible. The sense of the Committee had been that it was both desirable and feasible and the Committee had proceeded toward unification. The Committee also decided that it would be desirable to draft proposed supplemental rules dealing with certain unique admiralty procedures. The main objective had been to initiate a system of unification of the rules and the Committee did not

undertake to completely overhaul the supplemental rules as this would cause a great deal of controversy. Therefore the supplemental rules which were presented to the standing Committee stand not materially different from the old rules relating to the same subject but it is hoped that the work on them will continue.

Professor Currie stated that the Committee was presenting to the standing Committee the pamphlet of March 1964, proposing amendments, and the mimeographed copy in the Deskbook for the meeting, dated May 1, 1965, containing alterations thereto.

The standing Committee considered each rule individually as follows:

Rule 1. Scope of Rules

The Committee approved this rule as stated in the Preliminary Draft.

Rule 8. General Rules of Pleading

(e) Pleading to be Concise and Direct; Consistency

The Committee approved subdivision (e) as stated in the Preliminary Draft.

Rule 9. Pleading Special Matters

(h) Admiralty and Maritime Claims

Professor Currie stated this subdivision had been quite controversial and a critical point in the drafting of the rules.

Professor Moore inquired why the word "and" had been changed to "or" in the first sentence of subdivision (h). Judge Maris explained that

he was fearful that this would be frozen into a ~~rule~~^{rebutic} that would have to be followed literally and felt it best to use the disjunctive "or" in the singular case so that the rules will not be interpreted to mean that a claim must be both admiralty and maritime. Dean Ladd suggested that the Note explain why this was being done but Professor Currie felt that the Note makes clear that the Committee is trying to preserve the choice the pleader now has to avail himself of the distinctively maritime remedies and procedures. The consensus of the Committee was that it would not be necessary to set this out in the Note. Upon motion of Dean Ladd, the Committee approved subdivision (h) and the Note as shown in the Deskbook. Attention was called to the reference to 73(i) in line 8 as it should be 73(h).

Rule 14. Third-Party Practice

- (a) When Defendant May Bring in Third Party
- (b) When Plaintiff May Bring in Third Party
- (c) Special Instances of Apportioned Liability

The Committee approved subdivisions (a), (b), and (c) as shown in the Deskbook. Attention was called to the editorial changes necessary for conformity in the phrase "a third party" being used in some instances and the phrase "third party" being used in others.

Rule 17. Parties Plaintiff and Defendant: Capacity

- (a) Real Party in Interest

Professor Moore questioned why "bailee" had been included in the enumeration in subdivision (a) and suggested the paragraph be reconsidered. Professor Currie stated that "bailee" had been inserted to satisfy the

admiralty bar in cases treating owner or master of a vessel as bailee. He further stated that the members understood the rule to include "bailee" but the admiralty bar was dissatisfied. Professor Kaplan stated that in time he thought the whole rule should be re-examined. The Committee approved subdivision (a) as modified in the Deskbook with any further work on this rule to be left to the Advisory Committee on Civil Rules in its future program.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims

The Committee approved the rule as stated in the Preliminary Draft.

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder

Professor Currie stated that further consideration had been given to the proposed amendment to correct the ambiguity in lines 7 and 16 with reference to the phrase "all of them." The Committee had recommended the phrase be changed to "these persons" as shown in the Preliminary Draft but attention had been called to the fact that this was not sufficient and the ambiguity still remained. After consideration of the matter, the standing Committee approved subdivision (a) with the inclusion of the words "these persons" in line 7 and the word "defendants" to be inserted in lieu of the phrase "these persons" at the end of line 16 after the word "all."

Rule 26. Depositions Pending Action(a) When Depositions May be Taken

Professor Wright stated he had been very pleased with unification with the exception of this rule where the Civil Rules Committee had been reluctant to go as far as they might have gone. The Reporters had worked out a number of drafts so that it would not have been necessary to differentiate between civil and admiralty cases for the purpose of discovery. However, these drafts were unacceptable to the Civil Rules Committee. He further stated that he felt this rule, as proposed, is a makeshift provision -- that the admiralty lawyer has to go back to the revised statutes of 1875 in the 9(h) cases. Inasmuch as discovery is under study by the Civil Rules Committee, he hoped the standing Committee would express its desire that the Civil Rules Committee give serious thought to proposing some formulation to cover all cases rather than preserving differential treatment. Judge Maris thought this would be highly desirable. It was noted that the word "and" in line 16 should be changed to "or." After full consideration of the rule, subdivision (a) was approved as stated in the Preliminary Draft.

Rule 38. Jury Trial of Right(e) Admiralty and Maritime Claims

The Committee approved the proposed addition of subdivision (e) as stated in the Preliminary Draft with the deletion of the word "and" in line 3 and insertion of the word "or" therefor.

Rule 42. Consolidation; Separate Trials

(a) Consolidation

(b) Separate Trials

The Committee approved the amendments to subdivisions (a) and (b) as stated in the Deskbook.

Rule 43. Evidence

(a) Form and Admissibility

Professor Currie stated this proposed amendment did not have the concurrence of the Civil Rules Committee. He stated the background history of the rule and the Committee decided that inasmuch as the Advisory Committee on Rules of Evidence had not had sufficient time in which to consider this amendment, the proposed amendment to Rule 43 be disapproved.

Rule 53. Masters

(a) Appointment and Compensation

(b) Reference

The Committee approved subdivisions (a) and (b) as stated in the Preliminary Draft.

Rule 65. Injunctions (c) SecurityRule 65.1. [New] Security: Proceedings Against Sureties

The Committee approved Rule 65 (c) and Rule 65.1 as shown in the Preliminary Draft.

Rule 68. Offer of Judgment

After consideration of this rule the Committee, upon motion of Mr. Segal, approved the proposed amendment as shown in the Preliminary Draft

with a modification to delete the words "within a reasonable time" in lines 27 and 28 and insertion therefor the phrase "within a reasonable time not less than 10 days."

Rule 73. Appeal to a Court of Appeals

- (a) When and How Taken (d) Supersedeas Bond
 (f) Judgments Against Surety
 (h) Interlocutory Appeals in Admiralty and Maritime Cases

The Committee approved subdivisions (a), (d), (f) and (h) as stated in the Preliminary Draft subject to the action of the standing Committee during the discussion of the Civil Rules. [See pages 26 and 28 for further action of the Committee].

Rule 81. Applicability in General

- (a) To What Proceedings Applicable

The Committee approved the proposed amendment as stated in the Preliminary Draft for subdivision (a). *1005*

Rule 82. Jurisdiction and Venue Unaffected

The Committee approved the rule as shown in the Preliminary Draft with the deletion of the word "and" in line 4 and insertion therefor the word "or."

Rule 86. Effective Date

Judge Maris stated the date should be stated in the Order of the Supreme Court and not in the rule thereby making this rule unnecessary. The Committee so approved.

Form 2. Allegation of Jurisdiction
Form 15. Complaint for Damages Under Merchant Marine Act

These forms were amended to comply with the proposed rules. The Committee approved Form 2 and Form 15 as shown in the Deskbook.

Supplemental Rules A Through F

The Committee approved the supplemental rules as presented by the Admiralty Committee to preserve the present practice in admiralty. The supplemental rules were approved as an interim measure in connection with the unification .

The question arose concerning the usage of the word "OR" in the title of Rule A and it was felt that since this implies the plural usage that "AND" should remain in this instance. Professor Currie said the rules would have to be gone over again for editing.

Judge Pope, in explaining the job yet to be done by the Committee on the supplemental rules, mentioned the rule proposed by Professor Currie, and rejected by the Advisory Committee, concerning default judgment in actions in rem. The Ninth Circuit had been in touch with Judge Pope and is anxious to have a rule proposed which will take care of the matter.

Upon motion duly made, the Committee approved the proposed supplemental rules in admiralty with modifications contained in the Deskbook.

The Committee further approved a general resolution that the standing Committee requests the Advisory Committee on Admiralty Rules to

proceed with further study and possible revision of the proposed supplemental rules, including the further consideration of the form of notice to be required before a default judgment is entered in an in rem proceeding. The motion was seconded and carried.

Judge Pope stated that inasmuch as the present Admiralty Rules will be discontinued if the proposed rules are adopted, some members may wonder if the Advisory Committee on Admiralty Rules will continue to function. He stated that one member had been asked to join the Civil Rules Committee and that ultimately the more knowledgeable members may be asked to serve on that Committee. But aside from the continuance of the work of the supplemental rules he thought the Committee should be held in fact to receive comments from the admiralty bar as to the way in which the new rules, if approved, will function in actual practice. He suggested a letter to the admiralty bar saying the Committee would appreciate information from the lawyers based on the actual experience in dealing with the rules. He hoped that the Admiralty Committee might serve as an ~~inter-~~
~~mediate~~ ^{inter-} Judge Maris thought this might be done in connection with the Committee's work on the supplemental set of rules, but that eventually some arrangements other than a full Committee would have to be made for this purpose.

Agenda Item 3. Civil Procedure

Mr. Acheson, Chairman of the Advisory Committee on Civil Rules, presented the report of the Committee stating that the proposed rules

contained in the Preliminary Draft, with modifications as shown in the mimeographed copy of the Deskbook, were presented for consideration of the standing Committee. He stated that the future work of the Committee would center mainly around discovery, but that it would continue its revision of some of the rules with the hope of improvement and would keep in contact with the bar for suggestions based upon actual experience of the new rules. He further stated that he had hoped the recommendations of the Committee could have been unanimously recommended by the Committee but that Mr. Frank had dissented vigorously from the proposals of Rules 19 and 23.

Professor Kaplan stated that the recommendations for the rules, some of which had not been changed since 1938, were in no way intended to imply poor draftsmanship but merely that the last quarter century had uncovered various points where certain of the rules had shown up difficulties and flaws of language in interpretation. He further stated that he hopes the durability and wisdom of the proposed rules, if adopted, will be no less than the rules they are intended to supersede.

The following rules were considered by the standing Committee:

Rule 4. Process

(f) Territorial Limits of Effective Service

Professor Kaplan stated that subdivision (f), as well as 12(b), 13(b), and 41(b), is purely a formal change to accommodate the proposed

amendments for Rule 19. The Committee approved subdivision (f) as stated in the Deskbook.

Rule 6. Time

(c) Unaffected by Expiration of Term

The Committee recommends that subdivision (c) be rescinded on the ground that the statute makes it unnecessary.

Rule 12. Defenses and Objections -- When and How Presented -- By Pleading or Motion -- Motion for Judgment on the Pleadings

- (b) How Presented (g) Consolidation of Defense in Motion
(h) Waiver or Preservation of Certain Defenses

The Committee approved the proposal for subdivision (b) as stated in the Deskbook.

Professor Moore stated that he was very much in favor of the proposal in lines 67-75 of subdivision (h), quite agreeable to the proposal on defense of failure to join parties under Rule 19, but that it is a complete anachronism to allow a party to make a defense of failure to state a claim upon which relief can be granted or the objection of failure to state a legal defense of claim at the trial stage when you realize the party has had an opportunity to make a motion to raise his answer to move in summary judgment, to raise it at the pretrial, and it certainly is an anachronism to start at the trial stage to plead insufficiencies.

After discussion of the rule, Mr. Segal moved that the rule as stated in the Deskbook be approved with a recommendation that the Advisory Committee on Civil Rules be requested to give further consideration to

the points raised by Professor Moore with respect to right to raise these defenses at the trial.

The motion was seconded and carried unanimously.

Rule 13. Counterclaim and Cross-Claim

(h) Joinder of Additional Parties

The Committee approved subdivision (h) as stated in the Deskbook.

Rule 15. Amended and Supplemental Pleadings

(c) Relation Back of Amendments

Professor Moore presented the views of Judge Caleb Wright of Delaware concerning this amendment and stated that Judge Wright had decided a case upon which he looked to the proposed amendment for help but had found it inadequate. He stated that Judge Wright was in favor of the proposal but found that it did not go far enough in dealing with a situation where the filing of a complaint tolls the statute of limitations.

After discussion of the matter, the Committee approved the rule as stated in the Deskbook with a recommendation that the Advisory Committee on Civil Rules give further study to the problem raised by Judge Wright

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims

(2) -
The Committee approved subdivision (a) as proposed with the addition of commas inserted in lines 14 and 15 after the word "join" and before the word "as."

Rule 19. Joinder of Persons Needed for Just Adjudication

- (a) Persons to be Joined if Feasible
- (b) Determination by Court Whenever Joinder Not Feasible
- (c) Pleading Reasons for Nonjoinder
- (d) Exception of Class Actions

Professor Kaplan stated that present Rule 19 contains textural difficulties and deficiencies which the Committee hopes the amended rule will eliminate.

Mr. Segal inquired if there had been any consideration given for requirement of persons named in subdivision (c) to be advised by mail of the proceedings. Professor Kaplan stated the Committee had not considered that. Many aspects of this rule were discussed and Professor Kaplan thought Mr. Segal's suggestion may cause a great many problems to arise.

Judge Wright suggested the rule be committed to the discretion of the Reporter and Chairman of the Advisory Committee on Civil Rules with the suggestion made by Judge Boldt that the judge in his discretion may determine that the person so named be notified. Suggestions were made that some consideration be given to a provision for notice to the persons who are mentioned as possibly interested within the language of the rule and also that a change be made in Rule 12 to the reference to Rule 19 to restore the words "indispensable parties."

After full consideration, the Committee, upon motion of Judge Boldt, approved Rule 19 as written in the Deskbook, subject to modification with respect to notice, if, upon consideration, the Reporter and Chairman of the Civil Rules Committee are prepared to recommend such a proposal. Professor Moore voted against the motion.

Rule 20. Permissive Joinder of Parties(a) Permissive Joinder

This subdivision was approved during the discussion of the Admiralty

Rules as follows:

Approved with the inclusion of the words "these persons" in line 7 and the word "defendants" to be inserted in lieu of the phrase "these persons" at the end of line 16 after the word "all."

It was noted that the phrase "treated for the present purpose as including" will be unnecessary since the subdivision has been superseded.

Rule 23. Class Actions

- (a) Prerequisites to a Class Action
- (b) Class Actions Maintainable
- (c) Determination by Order Whether Class Action to be Maintained; Judgment; Actions Conducted Partially as Class Actions
- (d) Orders in Conduct of Actions [New]
- (e) Dismissal or Compromise [New]

Professor Kaplan stated that it was the general agreement of the Committee that Rule 23 needed to be strengthened by adopting a less formal or abstract approach than now appears in the text of the rule. He presented the background of the Committee's work on this rule.

Meeting recessed at 5:00 p. m.
Convened at 10:00 a. m. , June 29th.

Mr. Rankin inquired whether any consideration had been given to notice to governmental agency subdivisions about settlement of derivative suits. Professor Kaplan said not specifically, but it would be covered by

subdivision (e) at the bottom of page 98. Mr. Rankin thought there were a great many abuses along this line and thought that consideration should be given specifically to the governmental agencies who could protect shareholders who are represented but don't know what their rights are. Professor Kaplan inquired of the Committee whether they thought it should go so far as to amend subdivision (e) to include Mr. Rankin's proposal, but the Committee did not think this should be done.

Many suggestions were made for altering this subdivision and Professor Kaplan inquired of Mr. Rankin if it would meet his point to say in the Note that in appropriate situations the court might notify governmental agencies as well. Mr. Rankin said this would satisfy him. It was decided that this would also take care of the problem in Rule 19. After full discussion of this matter, the Committee approved Rule 23 with the modification to be made by the Reporter in the Note to clarify the matter of notice by saying that it would be appropriate for the court in proper cases to give notice to such governmental agencies as may be concerned with protecting the rights of the parties. Professor Moore voted against the motion.

Rule 23. 1. [New] Derivative Actions by Shareholders

The Reporter pointed out that this rule includes the material presently in subdivision (b) of Rule 23 as well as other appropriate provisions which the Committee thought necessary. The new material was supplied by the bar as the rule in the Preliminary Draft stated that derivative actions

may be maintained only if the court is satisfied that the plaintiff will adequately represent the interest of the corporation or association. The bar pointed out that this was unnecessary because the corporation is technically itself represented and there is no occasion to have the derivative shareholder plaintiff represent the corporation. Professor Kaplan summarized the background history of the rule and stated this rule contained the substance of Rule 23(b) which the Committee had wanted to use. Mr. Segal suggested that the word "settle" in the last paragraph of the Note in the Deskbook be changed to read "determine." The Committee agreed that this should be done.

After discussion of the rule, the Committee, upon motion of Mr. Segal, approved the rule as shown in the Deskbook with a change in the terminology of lines 20-23 as follows:

The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interest of the shareholders or members similarly situated in enforcing the right of the corporation or association.

Rule 23.2 [New] Actions Relating to Unincorporated Associations

The Committee approved this rule with the modification of the words "if the court is satisfied" to be deleted and the words "if it appears" to be inserted therefor on lines 4 and 5.

Rule 24. Intervention

(a) Intervention of Right

The Committee approved subdivision (a) as shown in the Deskbook.

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof

The Committee approved subdivision (b) as stated in the Deskbook.

Rule 43. Evidence

(f) Interpreters

The Committee approved subdivision (f) as stated in the Deskbook.

Rule 44. Proof of Official Record

(a) Authentication (b) Lack of Record (c) Other Proof

The Committee approved subdivisions (a), (b), and (c) as stated in the Deskbook.

Rule 44.1 [New] Determination of Foreign Law

The Committee approved this rule as stated in the Deskbook.

Rule 47. Jurors

(b) Alternate Jurors

The Committee approved subdivision (b) as stated in the Deskbook and recommended that the Chairman of the standing Committee work out some means of having an appropriate study made for the consideration of the possibility of permitting alternate jurors to be retained for substitution in the jury room in case, during deliberation, a juror becomes disabled.

Rule 59. New Trials; Amendment of Judgments
 (d) On Initiative of Court

Professor Kaplan explained the background history of the proposed amendments to subdivision (d) as stated in the Deskbook. He stated that the proposed amendments had received opposition from the bar so the rule had been considered at the May 1965 meeting of the Advisory Committee and reworked as shown in the Deskbook.

After discussion, Mr. Segal moved that the rule be approved with a modification of the second sentence in subdivision (d) to require the court to give notice ^{and an} ~~of an~~ opportunity to be heard before granting a motion for reason not given in the new trial motion of the party. The motion was seconded and carried by a vote of 7 to 0.

Professor Kaplan asked whether it was advisable to add in the Note the various admonitions about not reading ^{too narrowly} the grounds of the new trial motion. It was agreed that this should be done as long as it is clear that what the judge is doing can be fairly construed as coming within one of the reasons given by the parties.

Rule 65. Injunctions

- (a) Preliminary Injunction
- (b) Temporary Restraining Order; Notice; Hearing; Duration
- (f) Impounding Under Copyright Law

After consideration of subdivisions (a) and (b), the Committee approved them as stated in the Deskbook.

Subdivision (f) was disapproved. [See discussion on page 19].

Rule 81. Applicability in General(a) To What Proceedings Applicable

The Committee approved subdivision (a)(1) as stated in the Deskbook.

Rescission of the Copyright Rules

Judge Maris stated that Mr. W. Brown Morton, a member of the Civil Rules Committee, who is familiar with the copyright laws had been asked to attend the meeting during the discussion of the copyright rules.

Professor Kaplan summarized the background history of the copyright rules promulgated in 1909 and stated the Committee is recommending rescission of these rules as they are rigid in their terms and out of keeping with the general attitude of the FRCP toward interlocutory relief.

Mr. Morton thought it would be better if the Committee proceeded by waiting for the enactment of the revised substantive copyright law, which as presently proposed, does not differ materially in its language with respect to impounding to the Act of 1909, but which may come out with something different and then draft a modern rule hopefully not limited to copyright but for impounding generally where that type of remedy is appropriate -- perhaps by adding it to Rule 64. He also pointed out that the Judicial Conference of the Ninth Circuit, where a substantial block of the motion picture industry is found, succeeded in convincing its committees to recommend that the changes which were promulgated by the bar be not adopted.

Professor Wright moved that the Committee recommend rescission only of Rule 2 of the Copyright Rules and have an appropriate Note stating that impounding procedures remain under study and the proposed amendments to Rules 64(f) and 81(a)(1) with regard to copyright laws not at this time be recommended. The motion was seconded and carried.

The standing Committee expressed its appreciation to the Chairman, Reporter, and members of the Advisory Committee on Civil Rules for the exceptional work performed in preparing the proposed amendments.

Discovery

Professor Kaplan presented a brief history of the background for the study on discovery under the direction of Professor Maurice Rosenberg, Director of the Columbia University Project for Effective Justice. Professor Rosenberg elaborated on the methods used for collecting the data, the sources from which the data were taken, how the districts were selected for the survey, costs, and results of the study. He stated that in general the Project is striving to be useful to the Civil Rules Committee and hopes that, by the time the Civil Committee has concluded its deliberations, it will have had in time for conclusion of its deliberations the answers to any questions which the Project can be of assistance. After the Project reports to the Civil Rules Committee, it plans to release the survey to the public and profession.

Agenda Item 4. Uniform Rules of Evidence

Mr. Jenner, Chairman of the Advisory Committee on Rules of Evidence, gave a brief report concerning the work of the recently formed Committee and stated that Professor Cleary, Reporter for the Committee, had been granted a sabbatical of six months from the University of Illinois College of Law so that he might devote full time to the work of the Committee. The Committee had met in June and hopes to meet three times during the coming year. Mr. Jenner stated that the work of the Committee had begun and that it is the general estimate of the Committee that a period of three years will be necessary in which to complete its work.

Meeting recessed at 5:10 p. m.
Convened at 9:30 a. m. , June 30

Agenda Item 7. Appellate Procedure

Judge Prettyman, Chairman of the Advisory Committee on Appellate Rules, presented the report of the Committee stating that his Committee was instructed to draft a complete set of appellate rules beginning with the notice of appeal, laying aside for the moment what would be done with such rules. He stated that the first preliminary draft was presented to the standing Committee and was circulated to the bench and bar for comment. The Advisory Committee had received a great many comments immediately thereafter and that by fall the number was

sufficient to hold a meeting for their consideration. He stated that the American College of Trial Lawyers wanted to present recommendations but couldn't get their comments in until after the first of April and likewise the American Bar Association was delayed. Judge Prettyman stated that a tremendous volume of suggestions were received, the Department of Justice made a thorough study of the draft, the Federal Bar Association had a Committee which did a fine job, and the Fifth and Ninth Circuits also had Committees. A meeting was held in May for consideration of the late comments. Inasmuch as the Supreme Court does not have the power to prescribe uniform rules of appellate procedure the Civil Rules Committee had been asked to coordinate into the Federal Rules of Procedure such changes of the appellate procedure as feasible. The Supreme Court has requested rulemaking power for the appellate procedure and a bill has been introduced.

Judge Prettyman stated the matter to be placed before the standing Committee is for a decision as to what procedure the Appellate Committee should follow during the interim period. He stated that Professor Ward had prepared drafts of civil rules amendments which would effectuate what the Advisory Committee thinks should be done in respect to appeal. It calls for suggested drafts of Civil Rules 73, 74, 75 and 81 and Criminal Rule 37, which the Supreme Court has power to adopt, and which would take into effect what the Appellate Rules

Committee is recommending, concerning the record on appeal and determination of how it is to be presented to the court of appeals. He felt the standing Committee would have to decide whether it wants to recommend to the Supreme Court that it amend the Criminal Rules and the Civil Rules in such fashion that those rules would reflect the present thinking of the Advisory Committee on Appellate Rules, ~~or~~ whether it is advisable to wait until legislation appears, giving the Supreme Court power to write a complete set of Appellate Rules.

Professor Barrett stated that there is a special problem on Rule 37 of the Criminal Rules and his Committee is hopeful that the proposed amendment will be adopted. The Advisory Committee had received many letters asking why this had not been included in the Preliminary Draft.

Mr. Segal expressed the opinion that he felt, after hearing the discussion, that the Committee should approve the amendments before them rather than waiting for the legislation and he would recommend this be done. After discussion, Mr. Segal moved that the Committee proceed with the considerations of the recommendations with a view, at least at this stage, of including recommendations as to appeals insofar as they may be incorporated in the rules of civil or criminal procedure. The motion was seconded and carried.

The following rules were discussed:

Professor Ward stated that he would like to go on record as saying that the proposed amendments for Rules 37, 45, 73, 74, 75 and 81 are not the proposals of the Appellate Rules Committee as such. He was asked to revise these rules in such a way as to incorporate the substance of the Committee's recommendations. The Appellate Rules Committee has not approved these drafts but he felt that if ordered to do so, the Committee would have recommended rules similar to the ones he is proposing.

Original
Rule 37. (Civil) Taking Appeal; and Petition for Writ of Certiorari
 (a) Taking Appeal to a Court of Appeals

The Reporter stated that the most significant change in the proposals for this rule is the second paragraph of subdivision (a)(2) concerning the power of the district court to extend the time for appeal.

After discussion of the rule, Mr. Segal moved that the proposed rule as shown in the Deskbook be approved with the deletion of the phrase in the first paragraph of subdivision (a)(2) reading as follows:

but if a petition for rehearing is filed by the government within such period, the notice of appeal from such judgment or order may be filed within 30 days after entry of the order disposing of the petition.

Judge Prettyman inquired whether Mr. Segal's motion in taking this particular action was intended to mean that the Committee is passing on the question for all time. Mr. Segal stated that the intent of his motion was that in order for the entire question to be decided, under consideration of uniform rules of appellate procedure it should be stricken from the interim proposal without prejudice to its further consideration by the Appellate Rules Committee. The motion was then rephrased to read as follows:

Without prejudice to further consideration by the Advisory Committee on Appellate Rules of this particular provision, the provision in paragraph (2) of Rule 37(a) reading "but if a petition for rehearing is filed by the government within such period, the notice of appeal from such judgment or order may be filed within 30 days after entry of the order disposing of the petition" be stricken.

The motion was seconded and carried.

Mr. Segal moved that the Committee adopt Rule 37 as amended by the deletion of the above stated portion. The motion was seconded and carried. [See page 24 for further action of the Committee]

Rule 45. (Criminal) Time
(b) Enlargement

Judge Maris stated this is a satellite proposal for striking from the provision that there shall be no enlargement of time relating to periods of taking an appeal.

Professor Barrett stated that in the criminal rules proposals there are a series of amendments to Rule 45 which incorporates in slightly different form the context of this rule. Judge Maris stated this is not the only instance of this situation. Proposals are being taken from the Admiralty and Civil Committees which ~~overlap~~ and probably in this area ~~which~~ overlap, and the standing Committee will have to edit these and put them in a unified single form to be presented to the Conference. Professor Wright inquired whether Judge Maris would be responsible for this editing and he stated that he would.

Judge Wright moved the adoption of subdivision (b) subject to the editing mentioned above. The motion was seconded and carried.

Rule 73. Appeal to a Court of Appeals

- (a) How and When Taken (b) Notice of Appeal (c) Bond on Appeal
 (g) Docketing the Appeal; Filing of the Record on Appeal

Judge Maris explained that subdivision (a) relating to timely motions involves the difference of views of the Civil Rules Committee and the Appellate Rules Committee. The problem arises where a district court has erroneously extended time of filing a motion for a new trial which it has no power to do under the present rules, or which has treated an untimely motion as though it were a timely motion, and after the motion was denied the party appeals. The Committee considered the phrase "or by a motion held timely by the district court" as proposed for the subdivision, and after discussion Mr. Rankin moved that the proposals for (a) not be approved at this time but be referred back to the Advisory Committee

on Civil Rules generally insofar as it relates to new trials and to the Advisory Committee on Appellate Rules within its special sphere to the extent to which it affects the appellate process for further consideration. The motion was seconded and carried.

The Committee, upon motion duly made, agreed that the words "based on the failure of a party to learn of the entry of judgment" as stated in subdivision (a)(2) be stricken.

Mr. Segal moved adoption of the proposals for Rule 73 as stated in the Deskbook with the modifications stated above. The motion was seconded and carried. [See page 58 for further action of the Committee]

Rule 74. (Civil) Joint Appeals to the Supreme Court or to a Court of Appeals

The Committee approved this rule as stated in the Deskbook.

Rule 75. (Civil) Record on Appeal to a Court of Appeals

- (a) Composition of the Record on Appeal
- (b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered
- (c) Statement of the Evidence or Proceeding when no Report was made or when the Transcript is Unavailable
- (d) Correction or Modification of the Record
- (e) Transmission of the Record
- (f) Retention of the Record in the District Court by Order of Court
- (g) Record for Preliminary Hearing in the Court of Appeals
- (h) Return of the Record to the District Court

The Reporter stated that this rule was completely rewritten.

Discussion was held on the amended portion of subdivision (e) concerning the retention of the record for the use of the parties in preparing appellate

papers. Mr. Segal wondered why the proposal provided it could be held on stipulation or by order, but that if it is to be transmitted before the receipt of the appellee's brief it has to be by agreement and the order of the court should be left out. He thought that if there are time limitations and the court wants to look at the record, then it should read "by order of the court."

The Committee, upon motion duly made, approved Rule 75 with an amendment to be inserted in the second paragraph of subdivision (e) of the phrase "or the court may order" after the words "as the parties may agree."

Rule 81 (Civil) Applicability in General

(a) To What Proceedings Applicable

The Committee approved Rule 81(a)(3) as stated in the Deskbook.

Rule 37 (a) (Criminal)

Rule 73 (b) (Civil)

Judge Prettyman raised a point that he was concerned about the sentence in subdivision (a)(1) of Criminal Rule 37, as well as Civil Rule 73(a), reading "A motion for leave to appeal in forma pauperis shall be treated as embodying a notice of appeal."

After discussion, Professor Wright moved that this clause appearing in both Rules 37 and 73 be stricken from each rule with a request that the Appellate Rules Committee work this out.

It was pointed out that a reference should be added to the Note citing the cases on this subject. The motion was seconded and carried.

Agenda Item 8. Bankruptcy Procedure

Judge Forman, Chairman of the Advisory Committee on Bankruptcy Rules, presented the report of the Committee stating the first year was taken up with the bringing up-to-date and making consistent the orders and official forms in bankruptcy with the existing bankruptcy law. To that end 12 General Orders were revised, 23 Official Forms were revised, 9 Official Forms were abrogated and 4 new Official Forms promulgated, all of which were adopted by the Supreme Court in July 1961. He further stated that the Committee's activities have been hedged within Section 30 of the Bankruptcy Act permitting orders, forms and rules only within the limitations of the Bankruptcy Act as it existed since 1898 until last year. At the first meeting of the Committee it recommended that Congress enact legislation giving the Supreme Court the same powers of rulemaking in regard to procedure as it has in civil and admiralty matters, and unfortunately it took from the introduction of that bill in 1960 until October of 1964 to get the bill passed. Meanwhile, within the limitations of Section 30 of the Bankruptcy Act, the Committee continued its work on the general orders and official forms. He stated that 15 General Orders and 30 Officials Forms have been amended by the Committee, 7 new General Orders and 9 Officials Forms proposed, and abrogation of 2 General Orders and 9 Official Forms will be recommended. Judge Forman stated these have been put on the shelf as finished products but with the passage

of the new legislation giving the broader rulemaking power, these will have to be re-examined and brought into accord with the new program.

Judge Forman further stated that the Committee last met on June 17 and 18, at which time it made two decisions. One was to consider whether this subject matter in these recommendations shall be circulated at this time for the comment of all those interested. After discussion, the conclusion was that this would not be a good time to recommend this as in all probability there will have to be considerable changes made because of the legislation. Therefore, it recommends that these matters be withheld. The second matter was the approach to the drafting of rules. Professor Kennedy had approached the situation on a basis of being able to integrate the bankruptcy rules into the civil rules completely -- perhaps with a supplemental set of rules as proposed by the Admiralty Committee, but this raised a great deal of controversy because bankruptcy is unlike practically everything else in that only a small portion of it is adversary and the rest is administrative and it was the conclusion that the approach must be by way of investigating the bankruptcy rules and producing a new set of bankruptcy rules with as many references to the civil rules as possible. So along that line the Committee expects to go forward if the standing Committee so approves.

Judge Forman complimented Professor Kennedy on the excellent job he has done as Reporter for the Committee and stated that his services had been invaluable.

The standing Committee concluded that the work of the Bankruptcy Committee must be by way of investigating bankruptcy rules and preparation of a new set of rules with as many references to civil rules where ever applicable, with the objective toward unification to the extent possible since complete unification is impossible. The Committee accepted Judge Foxman's report with appreciation for the fine work performed by the Advisory Committee on Bankruptcy Rules.

Agenda Item 6. Criminal Procedure

Judge Pickett, Chairman of the Advisory Committee on Criminal Rules, presented the report of the Committee stating that shortly after the appointment of the Committee a survey was made and concluded that a complete study of the rules should be made on the entire body of the criminal rules. This work extended over a period of several years and in 1962 the proposed changes were circulated. A large quantity of comments were received and a second preliminary draft of proposed changes was circulated in 1964. The comments from the proposed changes were studied, the results of which embody substantially all the recommendations of the Committee. He stated there had been several rules under study for which no recommendation has been made due to the fact that the Committee was unable to reach a conclusion. Judge Pickett complimented Dean Barrett on the excellent job he had done and stated that he feels the recommendations for the proposed rules are a remarkable result of the Committee's efforts.

The following rules were considered by the standing Committee:

Rule 4. Warrant or Summons Upon Complaint(a) Issuance

The Committee approved subdivision (a) as shown in the Deskbook.

Rule 5. Proceedings Before the Commissioner(b) Statement by the Commissioner

The Committee approved subdivision (b) as stated in the Deskbook.

Rule 6. The Grand Jury

- (d) Who May be Present (e) Secrecy of Proceedings and Disclosure
(f) Finding and Return of Indictment

The Committee, upon motion of Mr. Ford, approved subdivisions (d), (e) and (f) as stated in the Deskbook.

Rule 7. The Indictment and the Information(b) Bill of Particulars

Upon motion of Mr. Segal the Committee approved subdivision (f) as stated in the Deskbook.

Rule 11. Pleas

Professor Barrett explained the history of the proposed changes for this rule which were of considerable substance. The third sentence of the rule was questioned concerning inquiry being made. Judge Boldt thought the second sentence was sufficient, especially if the defendant were represented by counsel, and that the third sentence was unnecessary. He felt, however, that some reference could be made if the defendant were

not represented by counsel and that the judge should not have to inquire whether there is a factual basis for the plea.

Judge Boldt moved that in lieu of the third sentence "Notwithstanding the . . . basis for the pleas", there be inserted the language "the court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." The motion was seconded and carried. *7. . . . that the motion*

Upon motion duly made, the Committee approved Rule 11 with the *rule* above stated amendment.

Rule 12.1 Notice of Insanity [New]

Professor Barrett stated the background of this rule which at first had been proposed as the Notice of Alibi, but which received no enthusiasm from the prosecutors, and to which there were a number of objections. The problem in federal courts is concerning the notice of insanity provision as there is no separate plea such as many states have. The federal courts have court provisions which seem to say that if there is any objection the government bears burden of proof on the issue of insanity and because of the nature of it there is no plea. The Committee thought it appropriate to put on the defense the burden of a prior notice so the government has opportunity to secure a doctor. It is hoped this might help with the Lynch v. Overholser problem, and would provide an orderly way for the defendant to notify all concerned that he was raising the issue of insanity.

The Committee expressed concern as to what would happen on a later determination of insanity and Mr. Segal moved that this rule be returned to the Advisory Committee for further study, expressing serious concern about the implications of the rule. The motion was seconded and carried.

Rule 14. Relief from Prejudicial Joinder

Professor Barrett stated the Committee did not go into joinder under Rule 8 and severance under Rule ¹⁴15 but had reserved this for future study. It responded to a series of Fifth Circuit cases which found "reversible error" in cases where judges had denied motion for severance and co-defendants' confessions were used in the trial.

Upon motion of Judge Boldt the Committee approved this rule as stated in the Deskbook.

Rule 15. Depositions

- (a) When Taken (c) Defendant's Counsel and Payment of Expenses
(g) At Instance of the Government or Witness

Professor Barrett summarized the background history of this rule and after further consideration by the Committee Mr. Rankin moved the rule be recommitted to the Advisory Committee on Criminal Rules for further study and deliberation as to the wisdom of the rule. The motion was seconded and carried.

Rule 16. Discovery and Inspection

- (a) Defendant's Statements; Reports of Examinations and Tests;
Defendant's Grand Jury Testimony
- (b) Other Books, Papers, Documents, or Tangible Objects
- (c) Discovery by the Government
- (d) Time, Place and Manner of Discovery and Inspection
- (e) Protective Orders

Professor Barrett summarized the background of the rule stating the present draft was developed out of good will and consultation with the government and with one or two exceptions the Department of Justice approved it. The Treasury Department, however, did not.

The matter of the government's having the burden of producing statements was discussed and several of the members thought the government should have this burden as well as private practice.

Professor Barrett stated that Rule 16 had been a very difficult problem for the Committee and that no one thinks this is the end product but that it is a very substantial jump in the direction of discovery for the defendant. He stated that the Committee had come out with the general feeling to compromise some but to propose a rule which would aid the defendant and the government stated it would accept it and try to make it work. He felt that the proposed rule was a good balance.

Mr. Segal moved that the words in subdivision (a), lines 22 and 23 "known by the attorney for the government to be within" should be deleted and the word "in" be inserted therefor. Judge Boldt moved a substitute motion which Mr. Segal accepted as follows:

the existence of which is known by the exercise
of due diligence may become known to the attorney
for the government

Judge Boldt's motion was seconded and approved. This phrase will appear in subdivisions (a) (1) and (2).

After discussion of the rule, the Committee, upon motion of Mr. Segal, approved subdivisions (a), (b), (c), (d) and (e) as stated in the Deskbook with the modification to subdivision (a) (1) and (2).

Rule 17. Subpoena

(b) Defendants Unable to Pay (d) Service

Professor Barrett explained the background of the rule and after discussion it was approved as stated in the Deskbook.

Rule 17. 1 Pretrial Conference

The Reporter stated the Committee tried to encourage the use of pretrial conferences to set a general framework and not to put in too many procedural type limitations at the present time. The Committee approved the rule as stated in the Deskbook.

Rule 18. Place of Prosecution and Trial

Rule 19. Transfer Within the District

The Committee approved the amendments to Rule 18 as stated in the Deskbook, and rescinded Rule 19 as being unnecessary in view of the amendments to Rule 18.

Rule 20. Transfer From the District for Plea and Sentence

(a) Indictment or Information Pending
 (b) Indictment or Information Not Pending
 (c) Effect of Not Guilty (d) Juveniles (e) Summons

The purpose of this rule is to clean up the procedure to take care

of the ambiguities that existed and to provide in subdivision (b) that Rule 20 procedure can be used not only in a case where a man has been indicted but also where he has been arrested on a warrant and indictment has ^{been} ~~not~~ ^{voluntarily} not been obtained. The defendant is protected by providing for a retroactive waiver of indictment.

Judge Boldt moved deletion of the word "fully" in line 67 of subdivision (d) inasmuch as he felt it was adding undue emphasis. The motion was seconded and carried.

The Committee, upon motion of Mr. Rankin, approved subdivisions (a), (b), (c), (d) and (e) as amended.

Rule 21. Transfer from the District for Trial

- | | |
|-----------------------------------|-----------------------------|
| (a) For Prejudice in the District | (b) Transfer in Other Cases |
| (c) Proceedings on Transfer | |

The Committee, upon motion of Mr. Ford, approved subdivisions (a), (b) and (c) as shown in the Deskbook with an amendment to subdivision (b) to insert the word "thereof" immediately after the word "counts" in the first sentence.

Rule 23. Trial by Jury or By the Court

- | |
|---|
| (b) Jury of Less than Twelve; Use of Alternate Juror After Jury Retires |
| (c) Trial Without a Jury |

The Committee approved subdivision (c) but deleted subdivision (b) in accordance with the discussion on the rule as shown under Rule 47, page 1. The action taken was to have the Chairman of the standing Committee work out some means of having an appropriate study made for the consideration of the possibility of permitting alternate jurors to

be retained for substitution in the jury room in case, during deliberation, a juror becomes disabled.

Rule 24. Trial Jurors

(c) Alternate Jurors

The Committee approved subdivision (c) as stated in the Deskbook. Professor Wright called attention to the fact that in the Note the sentence referring to Rule 23(b) will, in accordance with the action taken, be stricken. He also thought the Note should carry a sentence to keep the profession informed that the Committee is keenly aware of the problem and that a study is being made. Professor Barrett stated he was not in disagreement with this being done but that the Notes do not generally state all the matters that are under study, rejected, etc. The Committee, however, felt that in this instance it would be advisable to include a sentence in the Note to this effect and asked the Reporter to take care of it.

Rule 25. Judge; Disability

(a) During Trial (b) After Verdict or Finding of Guilt

The Committee approved subdivisions (a) and (b) as stated in the Deskbook.

Rule 26.1. Determination of Foreign Law

Judge Maris stated this rule is identical to Civil Rule 44.1 which had been approved. The Committee also approved Rule 26.1 as stated in the Deskbook.

Rule 28. Expert Witnesses and Interpreters

(a) Expert Witnesses (b) Interpreters

Professor Barrett stated that one minor change had been made which was not circulated. It was where the rule states that a witness appointed has to be informed of his duties in a conference where the parties have an opportunity to participate. It was felt unnecessary to bring a busy person to the court to be told of his duties when it could be done in writing and the parties would at the same time be informed. Mr. Rankin moved to insert in subdivision (a), line 11, the phrase ^{in writing} "a copy of which shall be filed in the record" ~~after~~ ^{in lieu} the words "in writing" as stated in the Deskbook. The motion was seconded and carried.

Judge Wright moved adoption of subdivisions (a) and (b) as stated in the Deskbook, including the amendment to subdivision (a), line 11. The motion was seconded and carried.

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury (b) Reservation of Decision on Motion (c) Motion After Discharge of Jury

Professor Barrett stated this was an editing problem and had received no objection from anyone. Upon motion duly made, the Committee approved subdivisions (a), (b) and (c) as stated in the Deskbook.

Rule 30. Instructions

The Committee approved the rule as stated in the Deskbook.

Rule 32. Sentence and Judgment

(a) Sentence (c) Presentence Investigation (f) Revocation of Probation

The Committee approved subdivision (a)(1) and (2) as stated in the Deskbook.

Professor Barrett stated that subdivision (c) had presented more controversy than any other section of the rule - - to a degree that the Committee at the last meeting was divided 5 to 5 on the vote, and which had led to the adoption of an alternate paragraph. Judge Wright inquired why the distinction had been made between the right of counsel for the defendant to read the report and the right of the defendant not to read it but to be told about it. Professor Barrett stated that the members felt in some instances it would be detrimental -- such as in a case where a wife makes statements about her husband and feels this may cause marital difficulty when the defendant returns home. Judge Boldt stated he was very much against mandatory disclosure as he felt it had a tendency to embarrass the probation officers and he also cited other instances where he felt it unwise. He thought it should be left to the discretion of the judges. Judge Pickett stated he thought the Committee should be informed as to where the objections to the mandatory provision came from and the extent. He stated that at least 90 percent of the federal district judges responding to the rule were vigorously opposed to it and that the majority of comments received were likewise opposed. The Probation Departments were not happy with the manner in which they promoted objection to it, but altogether it was vigorously opposed throughout the entire country. He personally felt this information should be released to counsel for the defendant but he stated that he had been influenced by the comments of the people who are charged with the duty of administering it,

and that the difference in what would be accomplished was not worth the disregard of the public's wishes and the opposition of those concerned.

Judge Maris inquired about the objections to the First Preliminary Draft concerning this matter and Professor Barrett stated that the first draft had stated "a summary of the material contained in the report of the presentence investigation" and the courts did not know what they were expected to do. The second draft read "the report of the presentence investigation". Professor Barrett stated that the one probation office which had not raised objection was the one in San Francisco where disclosure is used. However, he stated that some of the federal judges in California thought that federal discretionary disclosure worked out better than state compulsory disclosure. He also stated that in Minnesota, where compulsory disclosure had been adopted about 18 months ago, Mr. Pirsig, a member of the Criminal Rules Committee, had written that the attorneys, who were fearful of it, had found after this length of time that it works very well.

Mr. Rankin suggested a provision that the information be supplied unless the court finds reasons for not doing so, in which case it would be made a matter of record, subject to appeal. Judge Maris did not think this wise as it would involve the appellate procedure. Mr. Rankin stated he had seen cases where a stiff sentence had been issued for a minor crime because of the record that went along with it as there was no opportunity to meet it.

Professor Wright stated that he is wholly in favor of disclosure in these cases and that he has no doubt that eventually it will be adopted, but that as a matter of ~~respecting~~ rulemaking he thought it unwise to force upon the people who have to administer it something to which they are opposed as strongly as virtually every district judge and probation officer are to this. He felt that in procedure sometimes it is necessary to take a "baby step" before taking a "giant step," and this is an excellent example of a "baby step." The proposed Alternative B reminds the judge that he may do this, and the Note calls attention to it. He hoped that after the judges have more experience with disclosure they will find it is not as bad as they thought and that in a few years there will be complete disclosure in an atmosphere in which a rule such as Alternative A would at the present time be intolerable. Dean Ladd thought there was a great deal of merit in what Professor Wright said as it would be unfortunate to force disclosure at this time. Judge Maris also stated the Judicial Conference Committee on Administration of the Probation System feels very strongly about this.

After lengthy discussion of the rule, Mr. Segal moved adoption of Alternative B, not because he is opposed to disclosure, but in view of the merits of Professor Wright's statement. Judge Wright, however, moved a substitute motion for adoption of Alternative A. The motion was seconded, but lost in a vote of 3 in favor of the motion to 6 opposed. Mr. Segal again moved the adoption of Alternative B for discretionary disclosure. The motion was seconded and carried unanimously (two members abstained from voting).

Subdivision (f) was opened for discussion and Judge Boldt inquired whether it was necessary to mention in the subdivision that the defendant is entitled to counsel. Professor Barrett stated counsel was permitted under the general description of the man's ~~right~~ right to counsel. He thought perhaps the rule had been purposely left vague. Judge Boldt moved approval of subdivision (f). The motion was seconded and carried.

It was pointed out that in the Note the word "our" in the sentence referring to the case of Judge Thomsen should be "one."

Rule 33. New Trial

The Committee approved this rule as stated in the Deskbook.

Rule 34. Arrest of Judgment

The Committee approved this rule as stated in the Deskbook.

Rule 35. Correction or Reduction of Sentence

The Committee approved the rule with the addition of a comma to be placed in line 13 ^{"a"} after the word ~~holding~~.

Rule 37. Taking Appeal: And Petition for Writ of Certiorari

See discussion on pages 24 and 28 for action of the Committee.

Rule 38. Stay of Execution, and Relief Pending Review

(a) Stay of Execution

Mr. Segal suggested that the proposed sentence for subdivision (a)(2) was quite long and thought editorial changes should be made.

The Committee approved the subdivision subject to editorial changes by the Reporter.

Rule 40. Commitment to Another District; Removal
(b) Arrest in Distant District

The Committee approved the subdivision as stated in the Deskbook.

Rule 44. Right to and Assignment of Counsel
(a) Right to Assigned Counsel
(b) Assignment Procedure

Mr. Segal moved adoption of subdivisions (a) and (b) with a clarification in the Note to the sentences "Congress has now made provision for assignment of counsel and their compensation in all of the districts." This is to be enlarged upon to state that this covers a larger area than the Federal Justice Act, not only with respect to those who can pay and cannot obtain counsel, but with respect to petty offenses in district courts. The motion was seconded and carried.

Rule 45. Time
(a) Computation (b) Enlargement (c) Unaffected by Expiration of Term

Upon motion duly made subdivisions (a) and (b) were approved and subdivision (c) was ordered to be stricken.

Rule 46. Release on Bail
(c) Terms (d) Form, Conditions and Place of Deposit
(h) Supervision of Detention Pending Trial

Professor Barrett stated there is legislation pending in Congress which would bear on this rule if it were passed and in some instances may

be more liberal than those proposed. The Committee considered this matter at its last meeting and the disposition taken was to adopt Rule 46 as proposed, recognizing that if Congress passes a statute the rule may have to be revised. The Committee felt it would be unwise to wait for a statute which may not be adopted. Professor Barrett stated the purpose of the rule is to encourage release on bail.

Judge Boldt moved adoption of subdivisions (c), (d) and (h) as stated in the Deskbook. The motion was seconded and approved.

Rule 49. Service and Filing of Papers

(a) Service: When Required (c) Notice of Orders

The Committee approved subdivisions (a) and (c) as stated in the Deskbook.

Rule 54. Application and Exception

(a) Courts and Commissioners

The Committee, upon motion of Mr. Ford, approved subdivision (a)(1) as stated in the Deskbook.

Rule 55. Records

The Committee approved the rule as stated in the Deskbook.

Rule 56. Courts and Clerks

The Committee approved the rule as stated in the Deskbook.

Rule 26. Notice of Appeal

Professor Barrett stated that in light of the action taken for Rule 37 a revised form is necessary. The Committee approved the form as

as stated in the Deskbook.

Upon motion of Mr. Segal, the standing Committee extended to the Chairman, Reporter, and members of the Advisory Committee on Criminal Rules their appreciation for the superb work they had done in preparing the proposed amendments to the criminal rules.

Agenda Item 9(b) Consideration of Proposal of John M. Burnett, Esq.

Judge Maris summarized the correspondence between the Chief Justice and Mr. John M. Burnett of Manteca, California, concerning uniform rules for admission to the bar of the district courts. The Chief Justice had referred the matter to the standing Committee for study and recommendation.

Mr. Segal stated there had been some major developments since the time Mr. Burnett wrote his letter to the Chief Justice. He stated that federal judges are admitting attorneys and that the state courts in Mississippi and Alabama are cooperating. Judge Wright, however, stated that he had written an opinion where the court must admit outside counsel to defend as local counsel were unavailable. Mr. Segal moved that a study be made by some Committee to consider the current situation in regard to the matter. Inasmuch as Mr. Segal anticipates a trip to the South in July and since he is familiar with the problem, the Committee asked him to look into the matter and report to Judge Maris.

Agenda Item 9(e) American Bar Association

Judge Maris discussed his correspondence with General Franklin Riter, Chairman of the Special Committee on Pretrial Rules of Procedure of the American Bar Association, in which General Riter had asked for an extension of time for submission of their comments to the proposed rules. Judge Maris had advised General Riter that they must be received in sufficient time before the Judicial Conference in September in order to enable the Committee to study the proposals. He further stated that many of their suggestions would, no doubt, be of the same nature as others already considered, but that in all fairness to the Judicial Conference and the American Bar Association another meeting might be necessary in order to give full consideration to their proposals.

The Committee suggested that Judge Maris assume responsibility in consultation with the Advisory Committees and their reporters to determine whether there is anything presented which has not been thoroughly discussed, digested and decided by our organization. Mr. Segal said he would rather have Judge Maris determine, whether in his judgment there is anything requiring further action of the standing Committee, and upon motion of Mr. Segal the Committee authorized Judge Maris and the Chairmen and Reporters of the Civil, Criminal, Bankruptcy and Appellate Committees to determine whether there is

anything in the recommendations of the American Bar Association requiring further action by the Committee, in which event the Chairman of the standing Committee will have the power to reconvene the meeting.

The motion was seconded and carried.

Agenda Item 9(d) Budget for fiscal year 1965-66

Mr. Foley, Secretary of the Rules Committees, reported on the financial status of the Committee. He stated that from the 1965 fiscal year appropriation of \$90,000 it would appear from the report as of the end of the eleventh month and with a projection of expenses for the twelfth month that there will be a balance of \$4,800. He stated the House Committee has again allowed \$90,000 for the 1966 fiscal year, the Senate has not questioned it, and therefore there is optimism that this will be in the appropriation bill when passed. The projection for next year, due to increased meetings of the Evidence Committee and the Bankruptcy Committee, is almost \$95,000; however, there are some areas where there are possibilities of cutting down slightly. It may be that as the fiscal year progresses into next spring some meetings may have to be deferred until after July 1. Judge Maris stated the problem is that the full program is still underway in presenting the rules to the Judicial Conference and Congress and at the same time the new program for Evidence has been added which will tighten the budget.

There being no further business the meeting was adjourned at 5:00 p. m.