RULES OF THE SUPREME COURT OF THE UNITED STATES. Washington: U.S. Government Printing Office. Adopted April 14, 1980; Effective June 30, 1980. Pp. ii; 78. Free.[1]

Reviewed by William H. Allen[2] and Alex Kozinski[3]

Twentieth century procedure has come slowly to the highest court in the land, but come it has. Here as elsewhere, the vestiges of tradition have given way to the demands of efficient administration. Gone and unlamented are the admission of all applicants to the Bar in open court and the writ of certiorari to correct diminution of the record. So long gone that none of us remember them are the days of unlimited oral argument, and even the days when the customary argument was an hour per side are fading from memory. Moreover, although the tradition of delivering opinions in open court is retained, the oral opinions more often than not are quite perfunctory and not the full-blown opinions of yesterday. In this latest revision of its rules, the Supreme Court has taken further steps to bring its practice into the modern era already populated by the lower federal courts. To those, however, who have felt an arcane attachment to the more gentlemanly aspects of Supreme Court practice, which allotted practitioners freedoms — and attendant risks — not enjoyed in other federal courts, the day on which the new rules went into effect, June 30, 1980, was one tinged with nostalgia.

The new rules arrived with little fanfare. They had the immediate effect of depreciating every practitioner's investment in that authoritative manual of Supreme Court practice, Stern and Gressman.[4] On the other hand, the new rules generally clarify what was previously obscure procedure and make explicit what lawyers who frequently practice before the Court have known to be required, expected, or at least preferred form. They are therefore a further welcome step toward codification of the "common law of procedure" referred to by former Attorney General Garland at the turn of the century.[5]

No longer need the new Supreme Court practitioner puzzle,

---

[1] Single copies of the rules may be obtained at no charge from the Clerk of the Court. Multiple copies can be obtained for $2.50 each from Commerce Clearing House by reference to document number 5175. The rules are also reported at 85 F.R.D. 435 (1980).

[2] Member, District of Columbia Bar.

[3] Member, California and District of Columbia Bars.

[4] R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE (5th ed. 1978).

[5] A. GARLAND, EXPERIENCE IN THE SUPREME COURT OF THE UNITED STATES, WITH SOME REFLECTIONS AND SUGGESTIONS AS TO THAT TRIBUNAL 12 (1898), *quoted in* R. STERN & E. GRESSMAN, *supra* note 4, at 18.

for example, over the way to set up the cover of his brief. New rule 33.2(a) provides a veritable blueprint for "[a]ll documents filed with the Court," thereby rendering unnecessary resort to the briefs of more experienced colleagues for use as models. From the top of the page, where the number of the case appears (or where a space is left, when the document initiates a case), to the bottom, where the designation of the attorney of record must be given, the rule enumerates all items that must appear and specifies their order. The new rule finally settles a question of style that has long divided Supreme Court practitioners: Where does the case number go? While many, including the office of the Solicitor General, have followed the now required practice of placing the case number first, other members of the Bar, including no less a Supreme Court practitioner than Dean (and former Solicitor General) Griswold, have placed the number third, following the name of the Court and its Term. The new rule is a vindication of the former approach.

Regrettably, some other points have not received such elegant treatment. The very same rule 33.2(a), for instance, requires that "the name, post office address, and telephone number of the member of the Bar of this Court who is counsel of record for the party concerned" must appear on the front cover. Quite apart from the novel idea that a telephone number be stated on a Supreme Court brief, the rule is notably unhelpful in providing that, when more than one counsel is listed on the cover, "counsel of record shall be clearly identified." Nowhere do the rules specify just who qualifies as "counsel of record."[6] Nor do they suggest how he or she is to be designated; the only idea that suggests itself, placing an asterisk next to the name of one attorney and using a footnote on the front cover to designate him as the counsel of record, can hardly be viewed as consistent with the otherwise elegant lines of the cover.[7]

Probably the most drastic change in the rules is the imposition of page limitations on briefs. The old rules, which placed no such constraints upon petitions, jurisdictional state-

[6] The only hint appears to be the phrase "and upon whom service is to be made" following the term "counsel of record." This might mean that counsel of record is the attorney to whom service copies are to be provided by the opposing party. However, from the phrasing of the rule, receipt of service appears to be merely an incident of being counsel of record, rather than the full measure of that office.

[7] In practice the identification requirement has been ignored by many, including the office of the Solicitor General. *See, e.g.*, Brief of the United States and the Federal Respondents, Upjohn Co. v. United States, No. 79-886 (U.S., filed Sept. 11, 1980) (seven Department of Justice attorneys listed, none designated as counsel of record).

ments, and briefs on the merits, made the Court unique among the federal appellate courts.[8] Perhaps because of the burden imposed on the Court by lawyers pursuing this freedom, the new rules set strict page limits for these documents. Thirty pages are granted for jurisdictional statements, motions to dismiss or affirm, and petitions for certiorari and responses thereto (rules 15.3, 16.3, 21.4, 22.2); fifty pages for briefs on the merits (rule 34.3); twenty pages for amicus briefs pertaining to petitions for certiorari or jurisdictional statements (rule 36.1); and so on.[9]

It would appear that the Court is serious about these page limits. Unlike some other procedural rules, such as the time for filing briefs on the merits, which may be waived by the Clerk alone, a motion for enlargement or waiver of the page limits may be granted only by the Court or a Justice, upon motion submitted at least fifteen days before the filing date. Moreover, "such an application is not favored" (rule 33.4).[10] While the rule apparently reflects the Court's impatience with briefs that are too long, one wonders at the wisdom of blanket page limitations that can be enlarged only through the cumbersome procedure of a motion to a Justice or the Court. Although a page limitation may make some sense with respect to petitions for certiorari and jurisdictional statements, once the Court has decided to grant plenary review, it should be left to counsel to determine in the exercise of their professional judgment how best to walk the precarious line between conveying a full understanding of their case and losing the reader's

---

[8] *See* FED. R. APP. P. 28(g).

[9] Rule 33.3 converts these page limits for briefs produced by photostatic reproduction of typed copy. Any resourceful counsel who would attempt to circumvent the limits on typed pages by techniques such as setting margins farther toward the edge of the page, one-and-a-half spacing, and the use of a typewriter with an unconventionally small typeface should first take note of the provisions of rule 33.1(c) (requiring pica type and double spacing) and 33.1(d) (3/4-inch margin on all sides). Although the assistant clerk in charge of these matters has confessed that he does not take a ruler to each document to police compliance, the document must at least look good to the eye and appear to be in general compliance with the rules. Telephone Conversation with Assistant Clerk, United States Supreme Court (Oct. 15, 1980).

All of these page limits are exclusive of the subject index, table of authorities, verbatim quotations, and any appendices. In addition, summaries of argument are apparently not being counted toward the page limits. *See, e.g.*, Brief of Northwest Airlines, Inc., Northwest Airlines, Inc. v. Transport Workers Union, No. 79-1056 (U.S., filed Aug. 29, 1980) (53 pages of argument plus three of summary); Brief of the United States and the Federal Respondents, Upjohn Co. v. United States, No. 79-886 (U.S., filed Sept. 11, 1980) (44 pages plus seven of summary).

[10] The 15-day requirement makes this rule particularly burdensome since few lawyers prepare briefs sufficiently in advance to be able to predict the number of pages more than two weeks before the filing deadline.

attention by burdening him with trivialities. In any event, one suspects that whatever judicial time is saved by shorter briefs may be lost in considering and ruling on motions for extension of the page limits.

Although it can be argued that similar page limitations have worked well in the courts of appeals,[11] cases that have been selected for plenary review by the Supreme Court are likely to be more complex, and certainly more important to the development of the law, than the run of the mill appellate case. That, at least, has been the rationale by which the Bar has been willing to endure unflinchingly the recent proliferation of Supreme Court decisions containing lengthy explications of each Justice's particular view of the case.[12] It can only be hoped that, as a quid pro quo for the new page limitations, the Justices will endeavor to introduce into their opinions the terseness they now demand of counsel and avoid filling the pages of the *United States Reports* with essays reflecting pet interests that have little or no relation to the question for decision.[13]

These changes, particularly the strict page limitations, reflect the changing relationship between the Court and its Bar. Many items heretofore left to the discretion of the Supreme Court practitioner, with the gentlemanly understanding that the privilege would not be abused, are now consigned to rule. Perhaps because so many more lawyers are admitted to practice before the Court than ever before, the Justices believe this type of standardization is necessary.

One such standardizing change that is particularly saddening is rule 33.2(b), which specifies the color of the covers of printed documents. Under this provision, jurisdictional statements and petitions for certiorari are to be covered in white; responses to petitions and jurisdictional statements, in light orange; briefs on the merits, light blue, light red, and yellow; intervenor or amicus briefs, green; and so on.[14] By specifying

---

[11] However, no one knows how frequently motions for enlargement of page limits are made in the courts of appeals, and in our experience they are seldom denied.

[12] *See, e.g.*, Fullilove v. Klutznick, No. 78-1007, slip op. (U.S., July 2, 1980) (five opinions totaling 107 pages); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (six opinions totaling 156 pages); Buckley v. Valeo, 424 U.S. 1 (1976) (six opinions plus appendix totaling 294 pages); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam order plus nine opinions totaling 233 pages).

[13] *See, e.g.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 823–38 (1977); Flood v. Kuhn, 407 U.S. 258, 260–64 (1972).

[14] Curiously enough, in this kaleidoscope of colors, no provision was made for briefs in opposition to motions to dismiss or affirm, or supplemental briefs, each of which is specifically authorized by the rules. *See* rules 16.5, .6, 22.5, .6, 35.5. Presumably these fall within the catchall provision of the rule, which provides for a

not only the color but also the shade to be used, the new rule will put an end to the use of "firm colors," *i.e.*, adoption by a firm of a particular color that is used on all of its briefs in the hope that it will come to be associated in the minds of the Justices with that firm.[15] The new rule will also prevent other creative use of color such as that in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*,[16] a case involving fishing rights, where the briefs of petitioners, the Puget Sound Gillnetters Association et al., came appropriately attired in salmon pink.

In addition to these formal touches, the new rules contain some significant substantive changes. Petitions for writs of certiorari to review judgments in criminal cases must now be filed within sixty days after judgment, with a possible thirty-day extension obtainable from a Justice (rule 20.1). Under the old rule 22, petitions had to be filed within ninety days of a state criminal judgment with a possible sixty-day extension, and within thirty days of a federal criminal judgment, with a possible thirty-day extension. Rules 12.4 and 19.5 now provide that cross-appeals or cross-petitions for certiorari may be filed a nonextensible thirty days after receipt of the original jurisdictional statement or petition.[17] This change is truly deserving of praise, for it dispenses with the costly and frequently needless task of preparing a cross-petition or cross-appeal and holding it ready for filing in case a petition or appeal should be filed by the opposing party at the last minute.[18] The new rules also take away the additional twenty days given by the 1970 Rules to the government to respond to

---

tan cover for all unspecified documents. On the other hand, it is possible that briefs in opposition to motions to dismiss or affirm will be considered akin to reply briefs, and therefore should bear yellow covers.

[15] The rule does afford this luxury to the office of the Solicitor General, all of whose submissions are to be clad in gray. However, the Solicitor General in fact discontinued the use of the traditional gray cover some time ago, switching to a tan shade. Apparently valuing its own esthetic judgment over obedience to the new rule, that office continues to file briefs covered in tan. *See, e.g.*, brief cited note 7 *supra*.

[16] 443 U.S. 658 (1979).

[17] However, a cross-appeal or cross-petition that is timely only because of these provisions may not be heard on the merits unless the Court accepts the case for plenary review on the timely filed appeal or petition of the opposing party (rules 12.4, 20.5).

[18] Parties who have been formally designated respondents or appellees, but who in fact support the position of the petitioner or appellant, now have a nonextensible 20-day period in which to file any pleading (rules 10.4, 19.6). Reply briefs must now be filed at least one week prior to oral argument, rather than three days (rule 35.3). A petition for an extraordinary writ no longer need (but at counsel's discretion, still may) be prefaced by a motion for leave to file the petition (rule 27.1).

petitions for certiorari and jurisdictional statements.[19] Perhaps the Court found that the office of the Solicitor General was no more timely in filing responses under the fifty-day limit than under the thirty-day one.

The rules for filing and service of documents have also undergone some substantive changes. Rule 28.2 now provides that documents not received by the Clerk within the specified period are deemed to be timely filed if mailed within the time allowed for filing, provided that a notarized statement signed by a member of the Bar of the Court is filed with the Clerk, certifying and setting forth the details of the mailing.[20] The old rules contained a limited mail-in procedure, applicable only in the case of petitions for certiorari to review federal criminal judgments originally arising in outlying district courts such as Guam or Alaska.[21] Rule 28.4(c), reflecting a statutory change,[22] now requires service of process upon the attorney general of a state in any proceeding to which the state or its agents are not parties when the constitutionality of a state statute is called into question, much in the way the rules have long required service upon the Solicitor General when a federal statute was challenged (rule 28.4(b)).

The new rules also contain miscellaneous changes that clarify matters previously obscure, or codify practices already in existence. Rule 7 settles the meaning of the two-year prohibition on practice before the Supreme Court by law clerks and other court personnel, by specifying that this means "particip[ation], by way of *any form* of professional consultation or assistance, in any case before this Court" (emphasis added).[23] Another question that has arisen from time to time is whether an amicus may file a reply brief. Rule 36.2 now answers this in the negative. The same rule also specifies that amicus briefs must identify the party whose position is supported. Rule 44.4 now specifies the items to be presented in an application for

---

[19] *Compare* old rule 16.1 *with* new rules 16.1, 22.1. The new rules also delete the special treatment theoretically afforded to motions for oral argument by government amici curiae. *Compare* rule 38.7 *with* old rule 44.7. However, the Solicitor General, along with state and local government counsel, may still file amicus briefs without obtaining the consent of the parties (rule 36.4).

[20] Use of the mail-in procedure requires use of the United States mails. Use of a private courier service will not secure the benefit of this rule. Indeed, it is not clear whether use of a commercial courier — as opposed to a special messenger who personally delivers the documents — can ever constitute effective service under this rule.

[21] *See* old rule 22.2.

[22] *See* 28 U.S.C. § 2403(b) (1976).

[23] The rule extends this prohibition, previously applicable only to clerks and secretaries of Justices, to all Court personnel.

a stay, which include a copy of the judgment or opinion to be reviewed and the order, if any, denying relief below.[24]

Among the changes that give official recognition to existing practice are rule 23.1, which specifies that the Court may dispose of cases on petition for certiorari by summary disposition on the merits, and rule 37.2, which provides that cases will commence being called on the first, rather than the second, Monday of each Term. Similarly, rule 29.3 codifies the now accepted practice of seeking extensions of time for filing of briefs on the merits and certain other documents by letter to the Clerk, rather than by formal motion, and rule 54 includes the District of Columbia Court of Appeals in the definition of the term "state court." Two conforming changes pertain to the standard for granting certiorari. New rule 17, replacing the familiar old rule 19, omits as one of the bases for certiorari that the decision of a federal court of appeals resolves "an important state or territorial question in a way in conflict with applicable state or territorial law." Doubtless this reflects the Court's general distaste for diversity jurisdiction. On the other hand, the new rule recognizes as a basis for certiorari a conflict on a question of federal law between a state court of last resort and a federal appellate court, or among state courts of last resort.

The new rules also have taken account of changing times by significantly increasing the various fees charged by the Court. Rule 45 now doubles the cost for docketing a case to $200, to be increased to $300 when argument is permitted. The fee for admission to the Bar has been quadrupled to $100 (rule 45(e)).[25] And, whether as a revenue-raising measure or

---

[24] Rule 33.5(a) provides that all "documents" exceeding five pages shall be preceded by a table of contents, unless they contain only one item. Similarly, rule 33.5(b) requires documents exceeding three pages to contain a table of authorities. Although stay applications and other motions are clearly to be considered documents under rule 33, *see* rule 33.6, the Clerk's office has taken the position that stay applications will be accepted whether or not preceded by tables of contents or tables of authorities. *See* Application for a Stay, Moore v. Brown, No. A-195 (U.S., filed Aug. 28, 1980).

[25] Lest anyone suspect that this $75 difference is considered trivial by today's reputedly overpaid attorney, it is reported that during May and June the resources of the Clerk's office were severely strained by a flood of 4,000 applications from attorneys eager to gain admission at the $25 bargain rate. Telephone Conversation, *supra* note 9.

It should be noted that admission to practice before the Court is more important under the new rules than under the old. As noted earlier, only a member of the Court's Bar may take advantage of the mail-in procedure for filing documents. *See* p. 317 *supra*. In addition, while old rule 47.2 provided that applications made before a case has been docketed (*e.g.*, motions for extension of time to file petitions for certiorari) "must be signed . . . by the party or by counsel but . . . such counsel need not be a member of the bar of this court," new rule 39.2 specifies that such

as a probably futile attempt at deterrence, petitions for rehearing now must be accompanied by a filing fee of $50.

One other change merits discussion, not because of how much it accomplishes, but how little. Rule 30.7, dealing with the filing of joint appendices in cases in which plenary review has been granted, now contains a provision permitting the filing of the appendix used in the court below "if it conforms to the requirements of this Rule." The joint appendix, which must be filed in virtually every case argued on the merits, generally involves hundreds of pages of custom printing at a cost of thousands of dollars. The prospect of simply filing the appendix used below therefore seemed like an eminently reasonable idea, but this could not be done under the old rules because of differing requirements as to document size.[26] The new rule offered the hope that the Court would now accept the oversize appendices typically used in the lower courts. Yet this hope was dashed in one stroke by the Clerk's office, which informed us that rule 30's reference to rule 33, which specifies document dimensions, would be interpreted as incorporating those dimensional constraints into "this Rule" — rendering the oversized court of appeals appendices still unacceptable for Supreme Court use.[27]

No book review would be complete without a few stylistic comments. Almost every one of the rules has been rewritten somewhat, even where no substantive changes have been made. For example, rules 15.1(g) and 21.1(g), dealing with jurisdictional statements and petitions for certiorari, now italicize the word "concise" when exhorting attorneys to be brief in their statement of the case. (Curiously, the parallel "concise" in rule 34.1(g), dealing with the statement of the case in briefs on the merits, was left unitalicized.) A rather cryptic change is reflected in the new rule 17. Old rule 19 provided that "[a] review on writ of certiorari is not a matter or right, but of *sound* judicial discretion" (emphasis added). The new rule is identical, except that the italicized word is conspicu-

---

motions must be signed by counsel of record. Although "counsel of record" is a nebulous concept, *see* note 6 *supra*, it would seem at least to require membership in the Bar of the Court. Finally, the old rules were silent as to whether a petition for an extraordinary writ could be filed by a lawyer not a member. Rule 27.1 now specifies that an appearance of counsel form must be filed at the time of filing a petition for an extraordinary writ, and this form may be filed only by a member of the Court's Bar.

[26] Court of appeals appendices are normally reproduced by photocopying the relevant documents in a volume 8½ × 11 inches in size, *see* FED. R. APP. P. 32(a), while all documents filed in the Supreme Court must be 6⅛ × 7⅛ inches.

[27] Telephone Conversation, *supra* note 9.

ously omitted. Although the uncharitable reader might infer from this that henceforth the Court will exercise arbitrary and capricious — rather than sound — discretion in ruling on these petitions, we prefer to think that the rewording serves merely to remedy a redundancy.

In a few instances, however, the Court appears to have been somewhat carried away with clarifying its intentions. Rule 38, dealing with oral argument, is a good example. The Court has not only added the exhortation that "Counsel should assume that all Members of the Court have read the briefs in advance of argument," but immediately following has thought it necessary to italicize the admonition that "*[t]he Court looks with disfavor on any oral argument that is read from a prepared text*" (rule 38.1). And, in what can only be characterized as an overabundance of caution, rule 38.3 now informs counsel that they are "not required to use all the allotted time" for oral argument. Finally, the new rules have taken to capitalizing the terms Court, Justice, Clerk, Bar, etc. While this no doubt reflects the proper respect for these institutions, there is something to be said for the understated elegance of the old rules, where the terms were in lower case.[28]

Altogether it must be concluded that the Court has done an admirable job of revising its rules. Generally, the rules clarify and simplify the practice before the Court. We are happy to say that the changes in wording are also, for the most part, salutary; as far as rules can be, the new rules are readable and easy to follow. Although we have pointed out some potential problems, only time and experience will show whether the new procedures are workable. The Court has shown a willingness to reconsider rule changes that have proven unworkable or ineffective. One hopes that it will continue to do so should problems develop with these most recent reforms.

---

[28] *But see* A UNIFORM SYSTEM OF CITATION 25–28 (12th ed. 1976) (mandating capitalization of "Court," "Term," and "Justice," *inter alia*).