

Preface

In this, the Ninth Edition of *Supreme Court Practice*, we continue to follow our original purpose, stated in the First Edition in 1950: “to set forth in a single volume * * * as close as possible to everything, outside of the field of substantive law, that a lawyer would want to know in handling a case in the Supreme Court.”

Since 1950, of course, many changes have occurred in the Court’s rules and practices. So it is now the specific purpose of this Ninth Edition to provide, as close as possible, an accurate and complete accounting of the rules and practices of 2007 that a Supreme Court practitioner needs to know.

Many thousands of practitioners and nonpractitioners appear in some capacity before the Court each year. It is essential that they understand and follow all the relevant rules and procedures in effect at the time. But the relevant rules and procedures are not written in granite. They necessarily change from time to time, and such changes need explanation. While the Clerk’s Office is always ready and willing to explain the current rules and procedures, anyone interested in the work of the Court can benefit from the explanations in this book—explanations prepared and revised in close consultation with the Clerk’s Office.

It is also important that these procedural matters, while always subject to change, be presented by the Court in a coherent and up-to-date manner, such as the 48 Rules currently in effect. Such has not always been true. In the Court’s earliest days, in August Term 1792, Chief Justice Jay announced, in answer to the Attorney General’s inquiry, that “The Court considers the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.”¹

¹2 U.S. (2 Dall.) 411, 413–14 (1792). This statement of Chief Justice Jay, including its reference to the English court practices, had a long life span. It was reflected in the Supreme Court rules as late as 1932, when the then-Rule 5, entitled “Practice,” stated that the practices of the English courts afford “outlines for the practice of this court in matters not covered by its rules or decisions, or the laws of

Over the following 150 years the Court made numerous “alterations” in its rules of practice. Many of them were poorly drafted. Some were never publicized. Some were abandoned without notice. Never, during the Nineteenth Century, were the rules arranged or organized in a coherent manner; new rules were simply added indiscriminately at the end of the existing rules.² As Attorney General Garland wrote in 1898, “There is much in the practice and usages of the court not provided for by any rule, and in some instances cannot well be covered by rule; —a sort of common law of procedure that lies outside of rules and cannot be put down in written charts.”³

This chaotic accumulation of rules continued well into the Twentieth Century, although the various compilations of rules in 1908, 1910, 1925, 1928, 1932, and 1939 gradually became somewhat better organized. Finally, in 1952, the Court appointed a “Committee of the Supreme Court of the United States on the Revision of the Rules,” composed of eight outside lawyers plus the then-Clerk of the Court, Harold B. Willey. One of the outside members was Robert L. Stern, who at the time was the Acting Solicitor General of the United States.

The Committee, upon examining the then-most recent set of rules (those adopted in 1939), described substantial numbers of those rules as “ambiguous,” or “misleading,” or “consistently waived,” or giving “no guidance whatever,” or “obsolete” in their failure to reflect changes in the Court’s practices made necessary by congressional legislation over the preceding half century. The Committee also found the arrangement of the 1939 Rules “frequently confusing” and on occasion “almost hopelessly so.”⁴ The Committee thereupon drafted a rearranged and updated set of rules, which the Court adopted and made effective on July 1, 1954. 346 U.S. 945, with a partial dissent by Justice Black at 946–47 (1954). Although many of those 1954 rules have been subsequently rewritten, altered, and updated, their basic structure, content, consistency, and clarity have been retained to this day. Gone is the original process of simply adding new amendments at the end of then-existing rules without regard to consistency and without eliminating the outdated ones. The current rules, significantly amended as of October 1, 2007, are a model of clarity and consistency, organized in a logical fashion that makes it possible

Congress.” 286 U.S. at 596 (1932). Never did the Court rules specify the “matters” as to which the English practices might apply. Such references to the English practices were finally dropped in the Court’s 1939 Rules. 306 U.S. 671 (1939). Both the 1932 and the 1939 Rules, consistent with Chief Justice Jay’s remarks, included as an “Appendix to Rules” various congressional statutes affecting the Court’s jurisdiction, such as the Judiciary Act of 1925 that had expanded the Court’s certiorari jurisdiction (43 Stat. 936). See 286 U.S. at 633 and 306 U.S. at 727.

²An abortive attempt to arrange the rules in a logical or helpful manner occurred in 1859. The Court had ordered the Clerk to collect all the rules, designate and eliminate the obsolete ones, and arrange and classify the remainder under proper headings. Minute Book S, U.S. Sup. Ct., May 5, 1858–Feb. 7, 1860, p. 11182. But the Clerk failed in his effort to rearrange the rules in a systematic fashion. See F. Wiener, *The Supreme Court’s New Rules*, 68 HARV. L. REV. 20, 34–35 (1954).

³A. Garland, EXPERIENCE IN THE U.S. SUPREME COURT 12 (1898).

⁴The Reporter to this Committee was Frederick Bernays Wiener, an experienced Supreme Court practitioner. He wrote a definitive account of the Committee’s deliberations and observations in *The Supreme Court’s New Rules*, 68 HARV. L. REV. 20 (1954). The deficiencies of the 1939 Rules, referred to above, appear at pp. 20–33.

for practitioners, as well as the authors of this treatise, to understand and follow these critical rules of practice.

The process of assessing the need for updating the Court's rules, and then creating appropriate changes, is neverending, and rules revisions are now not infrequent. Starting with the revision in 1995, the Court added a new element to its rule-making process: making proposed rule changes available for public comment before finalizing them. Such proposed changes have been accompanied by "Clerk's Comments," designed to assist readers in understanding the proposed changes. This public exposure of proposed changes has been beneficial to the Court in that some proposals have been altered or even abandoned as a result of public comment (usually by practitioners before the Court, sometimes presented as a submission on behalf of a substantial number of members of the Court's bar).

All these rule changes and alterations have had their effect upon this treatise. The most dramatic effect occurred in 1954. As stated by the Reporter of the committee that drafted them, the 1954 revisions so "materially altered, clarified, and simplified" the rules of practice "that every textbook and practical manual antedating 1954 has become not only obsolete but, as to particular items, dangerously misleading."⁵ Our First Edition was no exception. Fortunately, Mr. Stern having been a member of the Court committee that had drafted the 1954 rules, we quickly produced a Second Edition in 1954, explaining the new and reorganized procedures. The subsequent editions of this treatise have all been designed to advise and help practitioners to understand and follow the frequently changed patterns of Supreme Court practices. This Ninth Edition is no exception, describing changes through the rules revision of October 2007, which significantly revised the formatting requirements for booklet-format briefs and introduced new procedures for the submission of amicus briefs at the certiorari stage. But changes at any given time are relatively few in number. And the Court no longer adds new rules indiscriminately at the end of the existing set of rules. Rather, revised or new rules become integrated into their logical places in the then-existing set of rules. The entire set of rules, which now include the revised or changed rules in their proper place, is then promulgated anew. As a result, the relatively few changes therein tend to be melded into the entire set of rules without being highlighted or designated as new procedures. It then becomes the duty of the practitioner, either by "Asking the Clerk's Office" or by examining treatises such as this one, to check and follow the revised requirements.

Changes in the rules since the publication of the Eighth Edition are incorporated into the relevant chapter and section discussions. For those who desire a short and complete summary of the steps to take in processing a certiorari, appeal, or merits proceeding before the Court, including filing time requirements, we provide an updated version of our "Checklists," located immediately following the Detailed Contents section, p. xxxi, *infra*.

One important benefit to practitioners in recent years has been the development and constant improvement of the Court's web site, where a wealth

⁵F. Wiener, *supra* n. 2, at 20.

of information about the Court is available and from where the Court's opinions, orders, rules, and argument transcripts are downloadable. The practitioner can access the Court's docket to determine the status of any case that has been filed but not yet acted upon by the Court. The site also constitutes an invaluable course of instruction for the neophyte practitioner, replete with suggestions and forms for preparing petitions for certiorari and other kinds of applications; all of this helpful information also appears in the appendices of this edition. In short, the time-worn phrase "Ask the Clerk's Office" has been in many respects replaced by "Click on the Web Site."⁶

No work of this nature could be published with confidence as to its usefulness and accuracy without the authors' efforts to secure the invaluable review, suggestions and corrections by the Supreme Court's Office of the Clerk respecting our discussions of these rules and practices. Such review by that Office has been given to all our nine editions.

Thus the authors' most generous thanks in 2007 must go to Clerk William J. Suter, Chief Deputy Clerk Christopher W. Vasil, Merits Clerk Denise McNerney, and others on the staff, who have patiently reviewed the authors' procedural writings, answered their innumerable questions, and made helpful suggestions.

Such assistance has been augmented by the Clerk's own interpretation of the 2007 rules changes, his Guide to Counsel in Cases to be Argued before the Court, and his Guide to Filing Paid Cases, and In Forma Pauperis Cases—all of which the Clerk's office quickly revised following the 2007 rules revision and which are included in the Appendices to this book.

Finally, this Ninth Edition has been written by the following authors:

Eugene Gressman is a coauthor of all nine editions of this book. He formerly served for five years (1943–1948) as a Supreme Court law clerk, actively practiced before the Court since 1952, participated in 13 oral arguments before the Court, and has taught constitutional law, federal jurisdiction, and Supreme Court Practice seminars at seven law schools. He has authored nearly 100 law review articles, most dealing with Supreme Court matters. He is now a William Rand Kenan, Jr., Professor Emeritus at the University of North Carolina School of Law. He is especially indebted to his secretary and word processor Bonita A. Summers, and to Margaret Hall, an extraordinarily helpful librarian.

⁶On two occasions in 2001, the "Ask the Clerk's Office" method of phoning or visiting the Clerk's Office for information was rendered temporarily inoperable. On the infamous September 11, 2001, the entire Supreme Court Building was evacuated for the day in fear of a terrorist aerial assault on the Capitol and surrounding buildings, thus making impossible any kind of contact with the Clerk's Office. A more lengthy interruption in the work and availability of the Clerk's Office occurred in late October 2001, when a postal anthrax invasion of the Supreme Court Building forced the closing of the building for a week. During that week the Court was forced to convene in the nearby federal courthouse to hear previously scheduled oral arguments. The Clerk's Office made somewhat belated responses to telephonic inquiries by transferring such inquiries to the home phones of the Clerk's staff. But it took longer to overcome the delay in opening packages of petitions and briefs that had been mailed to the Clerk's Office until they had been tested and found free of anthrax. Thanks to the Clerk's innovative use of electronic substitutes for mailed documents, provided by the affected parties after discussion with the Clerk, no such filings suffered dismissal for untimeliness.

Stephen M. Shapiro became a co-author beginning with the Sixth Edition in 1986, and **Kenneth S. Geller** became a co-author beginning with the Seventh Edition in 1993. These two co-authors have had remarkably similar careers. Each served as an assistant to the Solicitor General of the United States. Each served as a Deputy Solicitor General of the United States. And both are now partners in the law firm of Mayer Brown LLP. Mr. Shapiro is in its Chicago office and Mr. Geller is in its Washington, D.C., office. In both their governmental and private capacities, each has had extensive experience in petitioning, briefing, and orally arguing before the Supreme Court. Mr. Geller now serves as Vice Chairman of Mayer Brown LLP.

Timothy S. Bishop is a Chicago-based partner in the appellate litigation group at Mayer Brown LLP. Tim served as law clerk to Supreme Court Justice William J. Brennan, Jr., during the 1988 Term, and before that was law clerk to Judge James L. Oakes of the Second Circuit. He has argued a number of cases before the Supreme Court, and briefed more than 50.

Authors Shapiro, Geller, and Bishop gratefully acknowledge the assistance rendered by the following lawyers at the Mayer Brown law firm: Catherine Bernard, David Gossett, Andrianna Kastanek, Joshua Yount, Jeffrey A. Berger, and Britton Guerrina; summer associates Richard Caldarone, Rhett Martin, Indraneel Sur, and Rebecca Tinio; and paralegal Stephen F. Wells. Mr. Shapiro expresses thanks to Dorothy Shapiro for expert proof reading of chapters and Mr. Geller expresses thanks to Emilie Madden for her help with the manuscript.

Edward A. Hartnett, who revised one chapter of the Eighth Edition, joins the Ninth edition as a co-author. He was a law clerk to three federal judges, including Chief Judge John J. Gibbons of the United States Court of Appeals for the Third Circuit, and is the Richard J. Hughes Professor for Constitutional and Public Law and Service at Seton Hall University School of Law. He has been a Visiting Professor at the University of Virginia School of Law and the University of Pennsylvania Law School and has written about the jurisdiction and practice of the Supreme Court in law journals including *Boston College Law Review*, *Columbia Law Review*, *Constitutional Commentary*, *Texas Law Review*, and *William & Mary Law Review*. He thanks students David Boyd and William Hilton, as well as legal support specialist David Uibelhoer, for their assistance.

Professor Hartnett, joined by all the authors of this edition, expresses deep gratitude to Professor Gressman for his unstinting work on this Treatise. Professor Gressman (who wrote the first edition of this book with his co-author Robert L. Stern before Professor Hartnett was born) was a distinguished visiting professor for several years at Seton Hall when Professor Hartnett was new to the academy. Professor Gressman was then, and continues to be, a source of wisdom and wit, delivered with gentle patience and kind humility. He is also a true inspiration, continuing his dedicated work on this book through all of its editions, including this one, over the course of more than fifty years. It was a genuine privilege to accompany him on a visit to the Supreme Court Clerk's Office in preparation for this edition, and witness first hand the palpable respect shown him there.

The authors must express their deep appreciation of their publisher, The Bureau of National Affairs, Inc., and its BNA Books staff. We also give special thanks to James Fattibene, who has guided our production of both the Eighth and Ninth Editions, and to Brian Malsberger, who served as Senior Book Editor of the Ninth Edition. And we thank Cynthia S. Baskin, who reviewed the entire manuscript of the Sixth, Seventh, Eighth, and now the Ninth Edition, and has made our work intelligible for the printer as well as our citations correct.

Lastly but most importantly, the co-authors acknowledge the enduring support and encouragement given them in the production of this Ninth Edition by their wives: Joan Shapiro, Judy Ratner, Helene Greenwald, and Mimi McDonald-Hartnett.

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November 2007