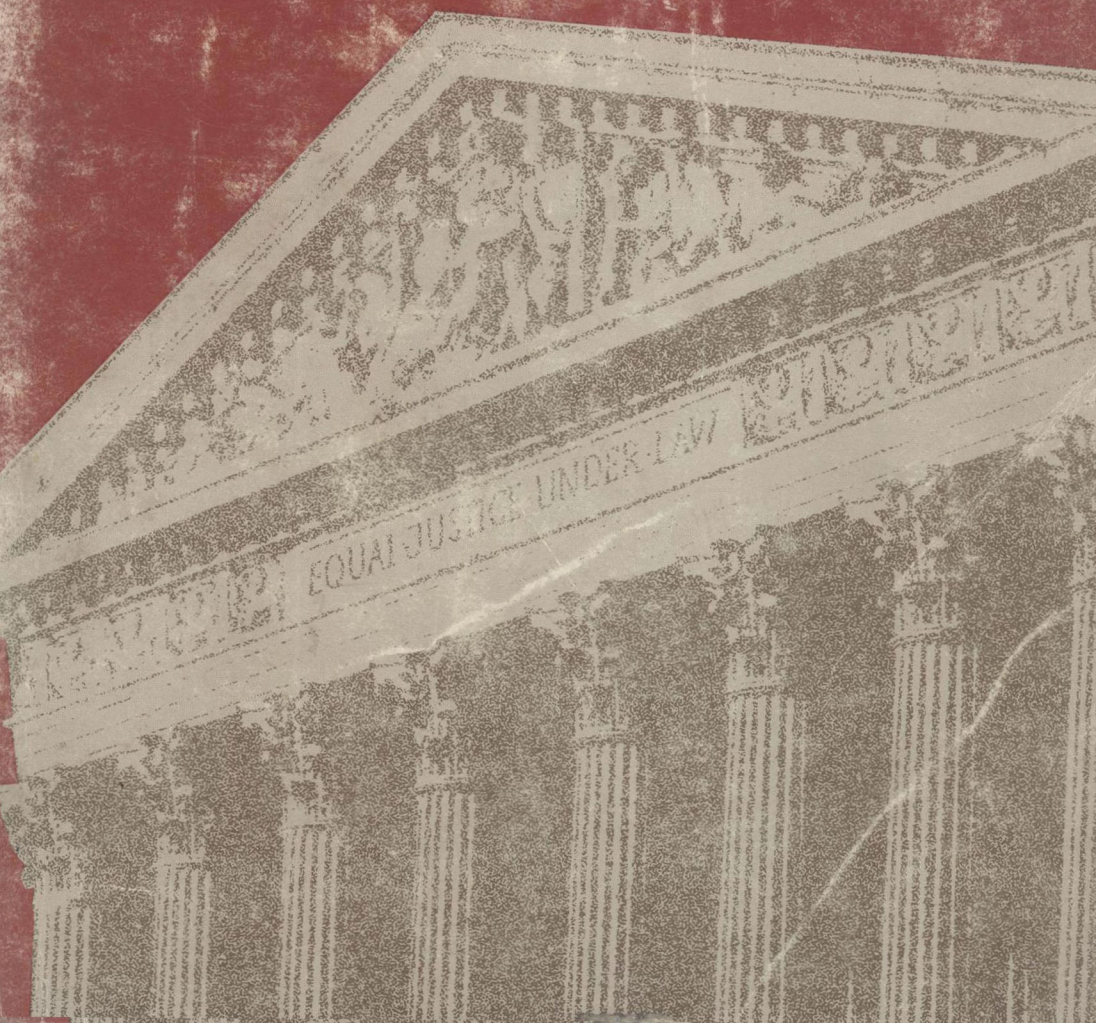


# Supreme Court Practice

5th edition

Robert L. Stern  
Eugene Gressman



# SUPREME COURT PRACTICE

## FIFTH EDITION

*For practice in the*

**SUPREME COURT of the UNITED STATES**

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# SUPREME COURT PRACTICE

## Preface

This book is designed to aid and to guide the attorney who is called upon to handle a case in the Supreme Court of the United States. It addresses the many facets of the jurisdiction, the practice, and the procedure that mark the highest tribunal in the land.

As was true of the four earlier editions, this book is not limited to a recitation of the procedures embodied in the rules promulgated by the Supreme Court. The attorney must view and follow those rules in light of the accumulated yet ever-changing experiences, customs, and precedents that illuminate these technical pathways of procedure. He must also have a working knowledge of the jurisdictional functions and limitations of the Court, and he must be aware of the principles and concepts that control the execution of the Court's powers. To those ends, this book delineates the jurisdictional frameworks within which both the Court and counsel must operate, as well as the procedures to be followed when the Court's jurisdiction has been invoked.

The effort, in short, has been to set forth in a single volume to the extent possible everything that a lawyer would want to know in prosecuting or defending a case in the Supreme Court. Of course, no attempt is made to cover the manifold substantive legal problems that come before the Court for resolution. What is attempted is a step-by-step description and analysis, sometimes critical in nature, of the procedures to be followed in every kind of case that can appear on the various dockets of the Court.

Among the practical matters discussed are the most effective ways of preparing petitions for certiorari, jurisdictional statements, briefs in opposition, motions to dismiss or affirm, briefs on the merits, and various other documents for submission to the Court. Check lists are included for the steps to be taken in docketing and processing both appeals and certiorari cases, as well as in pursuing a case through the briefing and oral argument schedules after

review has been granted. Techniques for persuasive oral argument are distilled from the experiences of judges and skilled advocates.

Other discussions of concern to the practitioner include descriptions of the day-to-day operations of the Court and its various offices, the alternative methods of admission to the Court's bar by written or oral motion, and the availability of Supreme Court briefs and records in libraries throughout the country. Also contained in the book are sample forms of petitions, briefs, and other documents that counsel may be called upon to draft, as well as all pertinent statutes and rules. In addition, the book includes many items of non-legal information which will be useful to the lawyer.

This fifth edition retains the basic format of its four predecessors. It has been thoroughly updated since the fourth edition appeared in 1969, and in several important areas it has been revised and rewritten. Chapter 1 considers for the first time the greatly enlarged workload of the Court in recent years and its effect on the practicing lawyer. Chapter 2 has been recast to reflect the repeal of most of the federal direct appeal statutes and to analyze the few surviving and little-known provisions for direct appeals from lower federal courts. Chapter 3 deals with the ever-troublesome problems of finality that confront the lawyer seeking review of a state court decision. More detailed consideration has been given the vexing problems arising from the Court's summary disposition of both appeals and certiorari cases. Recent decisions have required reconsideration of the previously simple question as to when a cross-petition and a cross-appeal need be filed. The procedures to be followed in *in forma pauperis* cases and the principles that control bail and stay applications have been accorded increased emphasis. And the elimination by the Court of the need to file a certified record of the proceedings below unless and until the Court accepts a case for full briefing and argument has necessitated important revisions in the discussions of the docketing, record, and appendix procedures.

Perhaps the major innovation of this fifth edition is the provision for a pocket supplement, to be inserted in the slit in the end cover of this book. Such a supplement, to be issued as the occasion demands, will advise the reader of major changes in the Court's rules and practices, as well as significant decisions relating to the Court's jurisdiction and procedure. The Court is currently considering the advisability of revising its rules. If and when those rules

are modified, a pocket supplement will be promptly prepared and issued.

The few persons who read the book straight through will discern a certain amount of repetition. But the authors believe that most lawyers do not read a law book like a novel; they turn to the section in which they are interested, and generally prefer not to be met with a series of cross-references even though some of the same material may also be treated elsewhere. Nevertheless, to keep the book from becoming unwieldy, there must be some limit to the amount of duplication. The result is a not entirely consistent treatment, based upon the authors' best judgment as to when to repeat and when to use a cross-reference.

No work of this sort could be published with confidence as to its accuracy and usefulness in the absence of assistance and suggestions from the staff of the Court. The Office of the Clerk has been especially patient, forbearing, and helpful in response to numerous time-consuming inquiries during the preparation of all five editions. The present Clerk, Michael Rodak, Jr., has taken the time to examine most of the manuscript of this edition; his comments have been unfailingly perceptive and helpful. The Deputy Clerks, Francis J. Lorson and Laurence P. Gill, have been equally helpful in explaining the procedures and practices of the Clerk's Office. And no recounting of the authors' gratitude for the willingness of those in the Clerk's Office to supply information as to their specialized tasks would be complete without mentioning Edward C. Schade, Jennie H. Lazowski, Kent Bloom, Edward H. Faircloth, Charles R. Godwin, William V. Gullickson, June M. Hoffmann, William T. McCormac, Jr., Evelyn R. Limstrong, Margaret H. McFarland, and Peter Beck. In a real sense, much of this work reflects the wisdom and experience of all of these dedicated members of the Clerk's staff.

While bothered to lesser extents, those in some of the other offices of the Court have provided the authors with invaluable information and insight into matters pertaining to their respective jurisdictions. The Public Information Officer, Barrett McGurn, has given freely of his time and information. The Reporter of Decisions, Henry Putzel, Jr., and Marjorie Eastridge of his staff have given assistance in making the many case citations in this book as accurate and complete as possible. From the staff of the Library, Betty J. Clowers and Robert E. Higbie have reviewed the authors' description of the Library facilities and have made

possible the inclusion of the locator plan of the Library's collections. And the Administrative Assistant to the Chief Justice, Mark W. Cannon, has tutored the authors as to the administrative structure of the Court and as to the many extra-judicial responsibilities of the Chief Justice of the United States.

Finally, the authors must repeat with added emphasis their lasting appreciation of their publisher, The Bureau of National Affairs, Inc., and its staff. The foresight and the encouragement of Dean Dinwoodey and Adolph Magidson were responsible not only for the original publication of this work in 1950 but also for the subsequent revised editions. As to the fifth edition in particular, the authors are grateful for the invaluable support of Donald F. Farwell, Director, BNA Education Systems, and for the tireless and understanding assistance of their editorial friend, Louise Rosenblatt.

*Robert L. Stern  
Eugene Gressman*

*May 1978*

## Check Lists

For the convenience of counsel, the steps to be taken by all parties, other than *in forma pauperis* cases, with respect to petitions for writs of certiorari, appeals, and cases which the Court has agreed to hear on the merits are summarized in the following check lists. References to the appropriate Supreme Court Rules are included. The numbered items are the steps required or permitted to be taken. Following each numbered item is the time limitation for taking the next step. These matters are covered in detail in Chapters 6, 7, 12, 13, 14, and 15.

### **CERTIORARI CHECK LIST**

- [1] Court below enters final judgment or denies timely rehearing petition.



Unspecified time prior to filing case in Supreme Court or at any time thereafter prior to action by the Supreme Court on the petition.

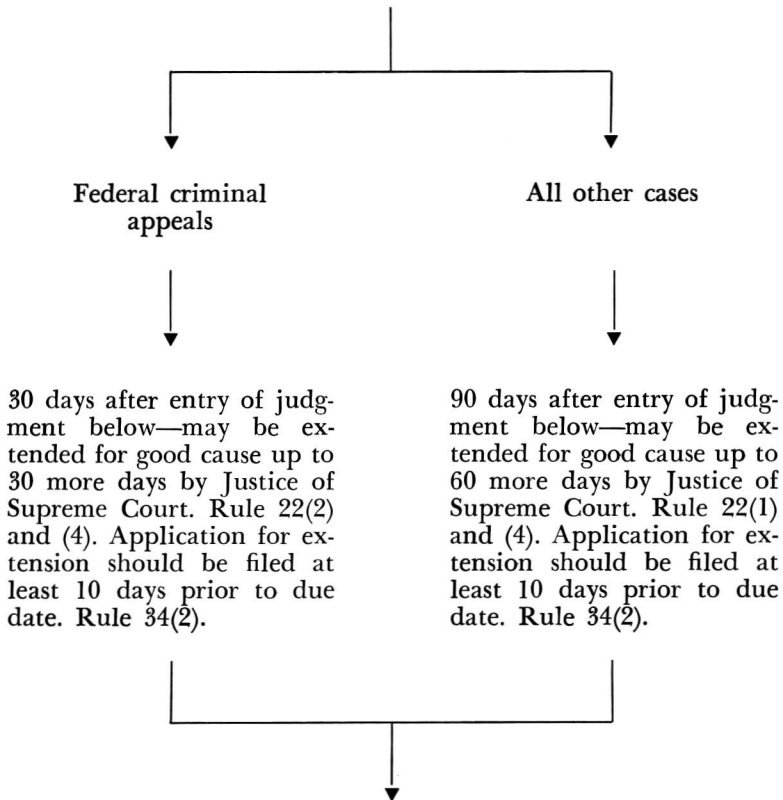


- [2] Either party has the option of filing all or any part of the record, as certified by the court below possessed of the record, or the Supreme Court may request that all or any part of the record be cer-

tified and transmitted so that the Supreme Court may consider it along with the petition. Rule 21(1).

**BUT**

The filing of the certified record in the Supreme Court at this juncture is not a requisite for docketing the petition, and the Supreme Court prefers that the record not be filed unless it so requests. Rule 21(1).



- [3] Petitioner docket or files case in Supreme Court (Rule 21) by:
- [a] Filing 40 printed copies of petition for certiorari.
  - [b] Paying \$100 docket fee.
  - [c] Filing proof of service of petition on “all parties required to be served.” Rule 33(3).
  - [d] Filing entry of appearance of counsel of record, who must be a member of Supreme Court bar.

- [e] At petitioner's option, filing all or any part of certified record. Rule 21(1).**



**Immediately thereafter**



- [4] Petitioner must notify all respondents, on form supplied by Clerk, of date of filing and of docket number of case. Rule 21(2).**



**30 days after docketing—may be extended by Court or Justice or by Clerk pursuant to Rule 34(5).**



- [5] Respondent files 40 printed copies of opposing brief (Rule 24(1)). Brief must be accompanied by proof of service (Rule 33(3)) and by an entry of appearance of counsel of record (Rule 33(4)). If petitioner has not done so, respondent may file all or any part of certified record if he so desires (Rule 21(1)).**



**Unspecified time (usually should be within 10 days; see Rule 24(3)).**



- [6] Petitioner may file 40 printed copies of reply brief “addressed to arguments first raised in the brief in opposition.” Rule 24(4). But distribution of petition and brief in opposition will not be delayed pending filing of such reply brief.**

**or**

**Any party “may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new**

cases or legislation or other intervening matter not available at the time of his last filing.” Rule 24(5).



Unspecified time (usually not less than 10 days after filing of respondent’s opposing brief).



[7] Supreme Court grants or denies petition for certiorari.



Forthwith



[8] Clerk enters order to the effect that petition is granted or denied and notifies court below and counsel of record of this fact. Rule 25.



As promptly as practicable after denial of petition.



[9] Petitioner may apply to appropriate Circuit Justice for an order suspending effectiveness of order denying certiorari, pending filing and disposition of petition for rehearing, where necessary to prevent some prejudicial action by lower court in reliance upon order of denial. Rule 25(2).



25 days from denial of petition for certiorari—may be extended or shortened by Court or Justice. Rule 58(2).



- [10] Petitioner may file 40 printed copies of rehearing petition restricted to grounds specified in Rule 58(2) and accompanied by signed certificate of counsel as to good faith and restriction to grounds so specified. Rule 58(2).



Within time specified  
by Court.



- [11] When and only when requested by Court, respondent must file 40 printed copies of reply to petition for rehearing. Without such request, no reply will be received. Rule 58(3) states that "No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto."

## APPEAL CHECK LIST

- [1] Court below enters final judgment or denies timely rehearing petition.



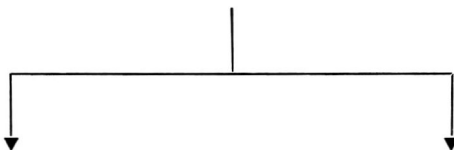
Unspecified time prior to Supreme Court action on the appeal.



- [2] Either party has the option of filing all or any part of the record, as certified by the court below possessed of the record, or the Supreme Court may request that all or any part of the record be certified and transmitted so that the Supreme Court may consider it along with the appeal papers. Rule 12(1).

BUT

The filing of the certified record in the Supreme Court at this juncture is not required for docketing an appeal, and the Supreme Court prefers that the record not be filed unless it so requests. Rule 12(1).

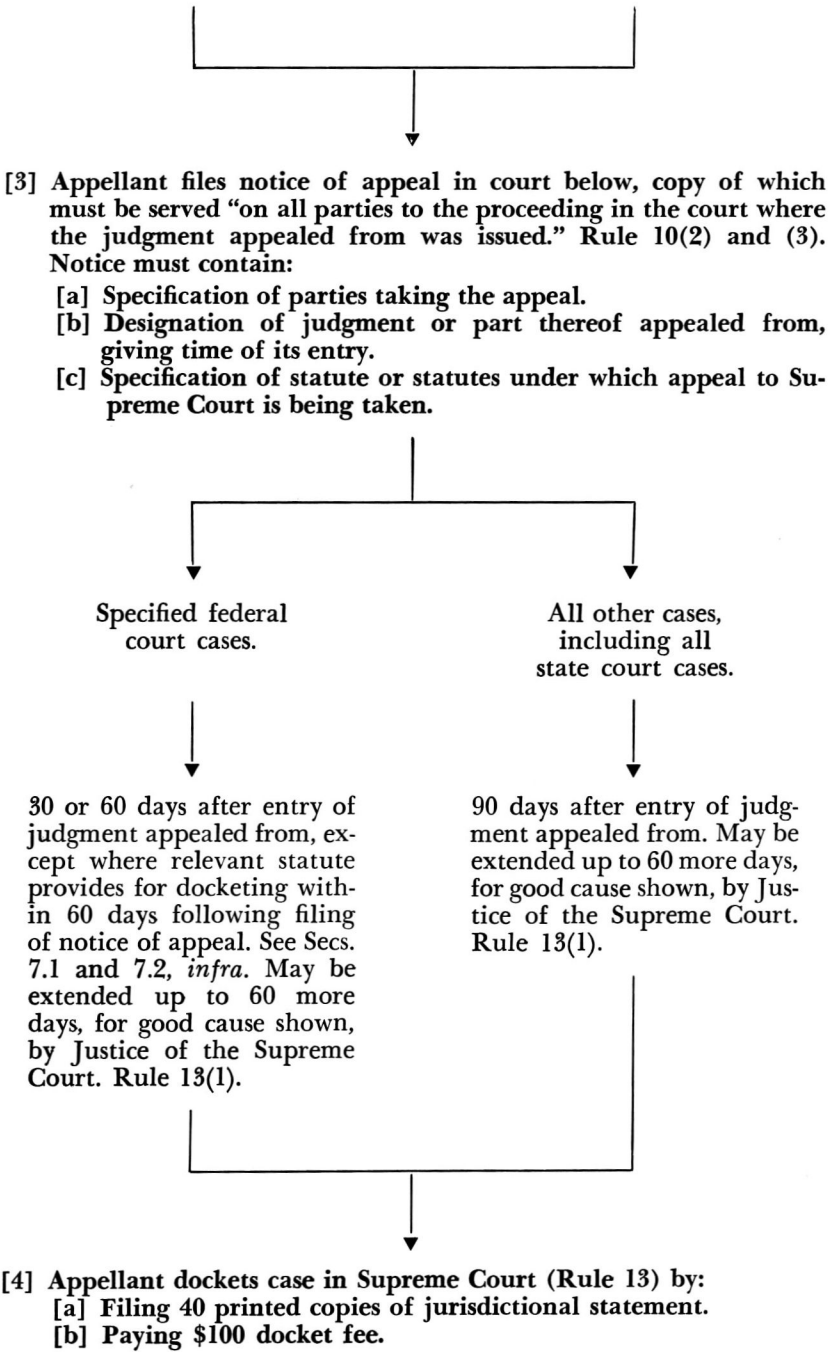


Specified federal court cases.

All other cases, including all state court cases.

30 or 60 days, specified by statute. See Sec. 7.2, *infra*. No extensions allowed.

90 days—no extensions allowed.

- 
- [3] Appellant files notice of appeal in court below, copy of which must be served “on all parties to the proceeding in the court where the judgment appealed from was issued.” Rule 10(2) and (3). Notice must contain:

- [a] Specification of parties taking the appeal.
- [b] Designation of judgment or part thereof appealed from, giving time of its entry.
- [c] Specification of statute or statutes under which appeal to Supreme Court is being taken.

Specified federal  
court cases.

All other cases,  
including all  
state court cases.

30 or 60 days after entry of judgment appealed from, except where relevant statute provides for docketing within 60 days following filing of notice of appeal. See Secs. 7.1 and 7.2, *infra*. May be extended up to 60 more days, for good cause shown, by Justice of the Supreme Court. Rule 13(1).

90 days after entry of judgment appealed from. May be extended up to 60 more days, for good cause shown, by Justice of the Supreme Court. Rule 13(1).

- [4] Appellant docket case in Supreme Court (Rule 13) by:
- [a] Filing 40 printed copies of jurisdictional statement.
  - [b] Paying \$100 docket fee.

- [c] Filing proof of service of jurisdictional statement on “all parties required to be served.” Rule 33(3).
- [d] Filing entry of appearance of counsel of record, who must be a member of Supreme Court bar.
- [e] At appellant’s option, filing all or any part of certified record. Rule 12(1).



Immediately thereafter



- [5] Appellant must notify all appellees, on form supplied by Clerk, of date of docketing and of docket number of case. Rule 13(3).



30 days after docketing—may be extended by Court or Justice or by Clerk pursuant to Rule 34(5).



- [6] Appellee may file 40 printed copies of motion to dismiss or motion to affirm, or both in the alternative.



Unspecified time (usually should be within 10 days; see Rule 16(3) and (4)).



- [7] Appellant may file 40 printed copies of brief opposing any motion filed by appellee. Rule 16(4). But distribution of jurisdictional statement and opposing motion, and consideration thereof by Court, will not be delayed pending filing of such brief by appellant.

or

Any party “may file a supplemental brief at any time while a jurisdictional statement is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.” Rule 16(5).



Unspecified time (usually not less than 10 days after motion to dismiss or affirm was filed).



[8] Supreme Court disposes of appeal summarily or orders oral argument by:

- [a] Summarily granting motion to dismiss and/or affirm, or summarily dismissing or affirming on own motion, or
- [b] Noting probable jurisdiction, in which event case will stand for argument and briefing on the merits, or
- [c] Postponing question of jurisdiction to hearing on the merits, in which event “counsel should address themselves, at the outset of their briefs and oral argument, to the question of jurisdiction.” Rule 16(6).



25 days from dismissal or affirmance—may be extended or shortened by Court or Justice. Rule 58(1).



[9] Appellant may file 40 printed copies of rehearing petition, accompanied by signed certificate of good faith. Rule 58(1). Unless otherwise ordered, such filing will stay judgment or mandate that would otherwise issue at expiration of 25 days from Court’s affirmance or dismissal. Rule 59(2). But if rehearing petition is not acted upon prior to Court’s adjournment for the Term, or is filed after Court adjourns, judgment or mandate is stayed only when so ordered by Court or Justice. Rule 59(2).



Within time specified by Court.