

D-R-A-F-T

**MINUTES OF THE MARCH 1968 MEETING
OF THE
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

The thirteenth meeting of the Advisory Committee on Rules of Evidence was convened in the Ground Floor Conference Room of the Supreme Court Building on Thursday, March 7, 1968, at 9:10 a.m. and was adjourned on Saturday, March 9, 1968, at 1:32 p.m. The following members were present:

Albert E. Jenner, Jr., Chairman
David Berger (unable to attend on Thursday)
Hicks Epton
Robert S. Erdahl
John Ewing Estes
Thomas F. Green, Jr.
Egbert L. Haywood
Charles W. Joiner
Frank G. Kaichle
Herman F. Solvin
Simon E. Sobeloff
Craig Spangenberg
Robert Van Felt
Jack B. Weinstein
Edward B. Williams (unable to attend on Saturday)
Edward W. Cleary, Reporter

Mr. Jenner welcomed the members and informed them that representatives of the standing Committee were unable to attend.

Agenda Item No. 1: Memorandum No. 19

PROPOSED RULES OF EVIDENCE 8-03 - HEARSAY EXCEPTIONS: DECLARANT
NOT UNAVAILABLE.

(b) (21) Recorded recollection.

Professor Cleary read subdivision (b) (21) of Rule 8-03 as proposed in the first draft on page 228 of Memorandum No. 19 and gave the background. While so doing, he inserted a comma after

the word "witness" in line 11.

Mr. Jenner asked Mr. Epton how he felt about the requirement, in the case where there was going to be proof on past recollection of a recording, that the witness first be able to testify that he has no recollection other than the recorded document. Mr. Epton felt that it was not an effective requirement at all. Mr. Selvin was in favor of the New Jersey and California rules regarding documents used for recollection. Mr. Williams said it was his understanding of the rule that the recorded document goes into evidence only if the witness says he has no recollection of the event of which he made the recordation. He said he saw no necessity of letting the recorded document in when the witness did recall the recorded event. Judge Van Pelt said that he would go along with the rule as proposed. Judge Estes supported the rule as written. Dean Joiner felt that if the witness did have recollection, then the recorded document should not be let in. Professor Green was in favor of not requiring that the witness have an absence of present recollection.

Mr. Jenner said that the issue before the Committee was whether there would be incorporated in a rule the requirement that before a document may be introduced as past recollection recorded, the witness has to testify that he has no recollection.

He assumed the notion that on policy there be no such requirement.

During an ensuing discussion, Professor Green said that he would be more specific as to what had to be shown. Professor Cleary felt that the whole tenor of the discussion added up to an unwillingness to allow into evidence prepared statements made by internal revenue investigators, FBI insurance adjusters, lawyers, etc. He said it seemed to him that the problem was whether what the Committee was concerned about was sufficiently bad to justify the junking of the whole notion, or if there was any possible defining of the proposed rule which might exclude the things about which the members were concerned but which would admit other things. Judge Weinstein suggested that the wording be to the following effect: "A memorandum or record not prepared for the litigation, made when its subject was fresh in the memory of a person who testifies as a witness, after the witness has first exhausted his recollection by his testimony."

Mr. Jenner said that the discussion had led him to the viewpoint that rather than considering policy along, the Committee had to consider the language of the rule in order to determine the policy issue. Following a few comments, Mr. Haywood moved that there be some rule on past recollection recorded. The motion was favored unanimously. Mr. Epton suggested the following language: "A memorandum or record made

by a witness when its subject was fresh in his memory who testifies he has no present memory of the subject but that it accurately reflects what (the knowledge) he then had." Judge Van Pelt suggested using the language of the New Jersey or California rule.

Following a general discussion, Mr. Selvin moved that the policy be that for the use of the memorandum in question it must be shown that the witness is without present or adequate recollection of the recorded document. The motion was lost by a count of 7 to 4. Since there seemed to be some misunderstanding as to what the lost motion covered, Mr. Epton moved that the motion be reconsidered. After a very brief discussion, the motion was voted on again, and it was carried by a vote of 7 to 6.

Mr. Spangenberg moved that the policy of the Committee be that in the event a witness has made a hand written statement within half an hour after the event describing all the details; that at the time of testifying he has an absolutely unimpaired perfect recollection of the event and testifies to all the events in the statement; he may, nevertheless, as an exception to the hearsay rule, have the statement identified as a statement of past recollection unimpaired and may offer the statement in evidence. The motion was lost by a count of 7 to 5.

Following a few comments, Mr. Haywood moved that the following words be added after the word "made" in line 9: "by the witness or under his direction". After a short discussion, the motion was lost by a vote of 8 to 3.

Mr. Williams raised a question with the reporter as to whether or not there were adequate safeguards against the introduction of grand jury testimony from FBI statements and IRS statements when the witness from whom the grand jury testimony was taken has an absolutely blank recollection with respect to the events about which he testified or gave facts. Professor Cleary said that he did not think that it involved the defamation of right of confrontation.

Judge Sobeloff moved that the words "not prepared in anticipation of litigation" be inserted after the word "record" in line 9. The motion was lost by a count of 8 to 2.

Mr. Williams moved that the policy of the Committee be that before an extrajudicial statement called past recollection recorded may be received into evidence that the witness must 1) have either no recollection of the event and therefore be unable to testify or 2) have an inadequate recollection to such an extent that that portion of the statement on which his recollection fails is not refreshed by the document. He said

that if the witness' recollection is unimpaired, then the extrajudicial, unsworn statement should not be admitted. Professor Cleary said that what Mr. Williams' motion amounted to in effect was that the language of the California rule be used. Mr. Jenner read the California rule. Mr. Raichle seconded Mr. Williams' motion, and it was carried by a vote of 7 to 6.

Judge Van Pelt moved that, as to any statement of the hearsay exception relating to recorded recollection, there be contained a statement to the effect that the memorandum or record may be read into evidence but the memorandum or record itself may not be received in evidence unless offered by the adverse party. Mr. Haywood stated the provision of Rule 63.1(b) of the New Jersey Rules of Evidence. Mr. Epton suggested that the motion be limited to narrative statements. During the discussion, Mr. Jenner said that he would include on the agenda, for inquiry at least, the question of what documents do or do not go to the jury. This would enable the Committee to reach a decision on the subject.

During a general discussion, Judge Van Pelt proposed that the language be: "A memorandum or record may be read into evidence but may not be delivered to the jury for consideration during deliberation on the case." Following further discussion, Judge

Van Pelt suggested: "The writing may be read into evidence only unless offered by the adverse party." Mr. Spangenberg suggested the following as an amendment to the motion:

"A memorandum or record may be read into evidence but shall not be received as an exhibit unless offered by an adverse party." Professor Cleary read the following from the California rule: "the writing may be read to the jury." Mr. Jenner asked if the following language would help: "The writing may be read in evidence, or in the case of a map, photograph, or otherwise, shown to the jury, but the writing itself may not be received as an exhibit unless offered by an adverse party." This amendment was acceptable to the maker of the motion, and the motion was carried by a vote of 9 to 1. Mr. Jenner stated that by the motion adopted, the reporter was to draft in substance the provision of § 1257b of the California Rules of Evidence.

Mr. Spangenberg suggested that, in lines 11 and 12 of subdivision (b)(21) of Rule 8-03, after the word "witness" the language be: "that it accurately reflects the knowledge which he then had." Professor Cleary proposed the following: "and shown by testimony at the trial to reflect accurately the knowledge which he then had." Mr. Haywood suggested: "upon his current ratification it accurately reflects the knowledge which he then had." Mr. Jenner stated that he understood that the Committee approved subdivision (b)(21) of

Rule 8-03 in general subject to the revisions which the Committee had adopted and requested the reporter to draft.

(b) (22) Judgment of previous conviction.

Following lunch, Professor Cleary read subdivision (b) (22) of Rule 8-03 as set out in the first draft on page 236 of Memorandum No. 19 and explained the background as set out in his comment beginning on page 237. While so doing, he suggested the addition of "except for impeachment" at the end of line 16.

After a recess for attendance at the Holmes Stamp Ceremony, Judge Weinstein said that he would delete the word "final" from line 9. There was a discussion covering res judicata, nolo contendere pleas, and convictions. Judge Weinstein said he wondered if the reporter's additional language "except for impeachment" did not require a separate provision for impeachment purposes. The reporter agreed that it was ambiguous and would have to be polished.

Following a short, general discussion, Dean Joiner moved that subdivision (b) (22) of Rule 8-03 be approved with the understanding that the reporter would incorporate a provision respecting the use for impeachment purposes. Mr. Haywood seconded the motion, and it was carried by a vote of 8 to 3.

**(b) (23) Judgment against person seeking indemnity,
contribution, or exoneration.**

Professor Cleary read subdivision (b) (23) of Rule 8-03 as proposed in the first draft on page 248 of Memorandum No. 19 and gave the substance of his comment starting on page 249. Following a general discussion, Mr. Epton moved that subdivision (b) (23) be eliminated. The motion was carried unanimously.

**(b) (24) Judgments as to boundaries and matters
of history.**

Professor Cleary read subdivision (b) (24) of Rule 8-03 as proposed in the first draft on page 254 of Memorandum No. 19 and gave the background. Dean Joiner said it seemed to him that it would be better to have the rule read: "Judgments as proof of matter provable by evidence of reputation." Following a short discussion, Dean Joiner moved that subdivision (b) (24) of Rule 8-03 be approved as drafted. The motion was carried unanimously, and as approved Rule 8-03(b) (24) reads:

**"(24) Judgments as to boundaries and matters of
history.**

"Judgments as proof of matters of personal or family history, or of boundaries or of matters of general history, essential to the judgment, if the same would be provable by evidence of reputation."

Professor Green asked if the introductory language of subdivisions (b) in Rules 8-03 and 8-04 showed examples of admission or exclusion of evidence. He suggested that the language be made clearer. Mr. Spangenberg suggested the insertion of the words "hearsay exceptions" after the word "following" in line 7. Professor Cleary proposed the following language: "By way of illustration and not by way of limitation the hearsay rule does not require exclusion of the evidence in the following situations:". Mr. Jenner stated that the reporter would redraft the introductory language of subdivisions (b) of Rules 8-03 and 8-04 so as to make clear that these exceptions to the hearsay rule do not mean that because they are exceptions, the evidence is admissible.

PROPOSED RULE OF EVIDENCE 8-04 - HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE.

(b)(1) Former testimony.

Professor Cleary read subdivision (b)(1) of Rule 8-04 as proposed in the first draft on pages 260 and 261 of Memorandum No. 19 and gave the substance of his comment thereto. He said the question was whether subparagraph (1) should be included in Rule 8-04 or as a requirement that the witness be unavailable. Mr. Williams asked to what the clause "at the instance of" in line 13 referred. Professor Cleary said that it meant (1) that in the case where the plaintiff

called the witness in the first instance and offered his testimony - that would be testimony offered at the instance of the plaintiff or (2) same parties in a retrial (witness dies in the meantime) the plaintiff again may offer testimony of the witness, because the defendant had a full chance to explore on cross-examination. However, he said, another situation which could occur is that in the same retrial the defendant offers the testimony of the witness. No one objected to testimony being offered in the two cases hypothesized.

Mr. Epton presented a case involving land pollution and the testimony of expert witnesses. He said he doubted that the rule on former testimony should apply to experts' testimony. During the lengthy discussion which followed, Professor Cleary said that he thought what was troubling the Committee was that they had the strong policy of preferring that the witness be present in person. He said that the question was one of arrangement and location in the overall scheme of the rules as well as one of under what circumstances should the evidence be admitted. But, he said, as long as there was a rule on former testimony which dealt with a group of hearsay exceptions in an unavailability situation, then it seemed to him that there was justification in putting the rule in as proposed.

Mr. Jenner asked what was included in unavailability. In reply, Professor Cleary referred the Committee to page 43 of Memorandum No. 19. Judge Weinstein moved that subdivision (b)(1) of Rule 8-04 be adopted as drafted. Dean Joiner seconded the motion, and it was carried by a vote of 7 to 4. As approved, Rule 8-04(b)(1) reads as follows:

"(1) Former testimony. Testimony given as a witness at ~~ANOTHER HEARING~~ of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered."

[The meeting was adjourned on Thursday at 5:28 p.m. and was resumed on Friday at 9:05 a.m.]

(b)(2) Statement of recent perception.

Professor Cleary read subdivision (b)(2) of Rule 8-04, as proposed in the first draft on page 261 of Memorandum No. 19, and his comment thereto beginning at page 272. Mr. Spangenberg moved adoption of subdivision (b)(2) of Rule 8-04 as drafted. During the ensuing discussion, Judge Van Pelt asked if there are any states where this rule has been adopted where there is required some notice prior to trial of the intent to offer such a statement. Also, he asked, as to ~~UNAVAILABLE~~ witnesses, what is left of the hearsay rule. Professor Cleary said he did not think that the Rules Committee should ~~NOT~~ be involved with questions of notice of intended testimony given. As to what was left of the hearsay rule, there followed further

general discussion. Some members felt that this rule would leave nothing in the hearsay rule. Following further discussion, a vote was taken on Mr. Spangenberg's amended motion to approve (b)(2) of Rule 8-04 in principle. The motion was lost by a vote of 9 to 5. However, since there had been a misunderstanding on the part of some voters as to the witness being unavailable strictly because of death, Judge Estes moved to reconsider the motion which had been lost. Following a brief discussion, a vote was taken on the reconsidered motion to approve subdivision (b)(2) of Rule 8-04 in principle, and the motion was lost by a count of 8 to 6.

Mr. Jenner said that, in view of the nature and character of the proposed rule and the reaction of the ABA, the Model Code, etc., he was submitting to the Committee the feasibility or desirability of hammering out some kind of a subsection of this nature to be submitted with the Committee's report advising the bar that the vote of the Committee was adverse, but that in an effort to elicit comments, the issue was being presented to the bar. By doing that, Mr. Jenner said, the Committee would not go to the country without having something on the subject. There followed a general discussion concerning the Uniform Rules of Evidence and the function of the Rules Committee.

Judge Weinstein said that there were three alternatives to the proposed rule: 1) that no other evidence be available; 2) to say that the statement has to be in writing; and 3) to limit the statement to one other than that taken for purposes of litigation by an attorney, claim agent, or the like. He moved to amend Rule 8-04(b)(2) by having the following language used: "A statement other than one taken for purposes of litigation by an attorney, claim agent, or the like, made by the declarant at a time when the matter had recently been perceived by him, while his recollection was clear and in good faith." Following a short discussion, Mr. Jenner said that he thought what should be done was to have the reporter, with the help of a few of the Committee members, prepare a draft as an alternative to the reporter's originally proposed draft of Rule 8-04(b)(2) and have it brought back for further consideration. Mr. Epton suggested that the rule provide for utter and free consideration of all the circumstances under which the statement was taken.

(b)(3) Dying declarations.

Professor Cleary read subdivision (b)(3) of Rule 8-04 as proposed in the final draft on page 281 of Memorandum No. 19 and gave the substance of his comment thereto beginning at page 283. Dean Joiner supported Mr. Epton's motion to strike

the word "dying" from line 8. Following a short discussion, the motion was carried by a vote of 8 to 4.

Mr. Spangenberg moved that the word "impending" in line 8 be changed to "threatened". Following further discussion with regard to the title of the subdivision, Judge Weinstein moved adoption of subdivision (b)(3) of Rule 8-04 as amended with the understanding that the reporter was to consider the changes suggested. Dean Joiner seconded the motion, and it was carried by a vote of 10 to 3.

(b)(4) Declarations against interest.

Professor Cleary read subdivision (b)(4) of Rule 8-04 as proposed in the final draft on pages 281 and 282 of Memorandum No. 19 and referred to his comment beginning on page 288. Mr. Epton moved adoption of subdivision (b)(4) of Rule 8-04. The motion was carried unanimously. [Further action on this motion.]

Dean Joiner moved that subdivision (4) be transferred from Rule 8-04 to Rule 8-03. During the ensuing discussion, Mr. Spangenberg said he felt that a statement against the declarant's interest offers the strongest guarantee of trustworthiness to be had, and in this instance he saw no need for limiting it to unavailability. Dean Joiner's motion was lost by a vote of 7 to 5.

Since there had been some misunderstanding on the motion to adopt subdivision (b)(4), another vote was taken. The motion was carried by a count of 12 to 2. As adopted, Rule 8-04(b)(4) reads as follows:

"(4) Declarations against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true."

PROPOSED RULE OF EVIDENCE 8-01 - DEFINITIONS.

(c)(4)(vi)

Professor Cleary read Rule 8-01(c)(4)(vi) as proposed on page 43 of Memorandum No. 19 and explained that the Committee had earlier decided to return to this rule in connection with declarations against interest. Mr. Maywood moved deletion of subdivision (c)(4)(vi) of Rule 8-01. Following a short, general discussion the motion was carried unanimously by those voting (11 members voted - no negative votes by other members).

PROPOSED RULE OF EVIDENCE 8-04 - HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE.

(b)(5) Statements of personal or family history.

Professor Cleary read subdivision (b)(5) of Rule 8-04 as proposed in the final draft on pages 282 and 283 of Memorandum No. 19 and gave the substance of his comment thereto beginning on page 294.

Following discussion during which hypothetical and actual cases were presented, Dean Joiner moved approval of subdivision (b)(5) of Rule 8-04 with the understanding that the reporter would redraft provision (iii), along the lines suggested by the reporter during his presentation of the rule, to make the meaning clearer. The motion was carried unanimously. As approved, Rule 8-04(b)(5) reads:

"(5) Statements of personal or family history.
"(1) ~~Statements concerning the declarant's own birth,~~ marriage, divorce, legitimacy, relationship by blood or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter declared; (ii) statements concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; (iii) statements under (i) or (ii) hereof incorporating statements under (i) or (ii) hereof."

PROPOSED RULE OF EVIDENCE 8-01 - DEFINITIONS.

Professor Cleary said that the organization of the rules as he had set them up excludes admissions from the definition of hearsay. At the December meeting, he said, the question had been raised as to whether admissions ought to be relocated as a hearsay exception rather than being excluded from hearsay at all. The reason he had them where they were was that in the case of an admission there was no real circumstantial guarantee of proof. He said that the part on admissions just did not fit into Rule 8-03. Dean Joiner moved adoption of the reporter's recommendation that subdivision

(c)(4)(iv) of Rule 8-01 remain therein. The motion was carried unanimously.

(d) Unavailability.

It was agreed that subdivision (d) of Rule 8-01 should be moved to Rule 8-04. Professor Cleary read subdivision (d) of Rule 8-01 as proposed in the first draft on pages 43 and 44 of Memorandum No. 19. There was a lengthy discussion concerning the availability or unavailability of persons who might be physically unable to attend although perfectly mentally competent so to do, or of the person who although physically able was mentally unable to give testimony. Mr. Epton suggested the addition of the words "mental or physical" before the word "sickness" in line 37 and the deletion of the words "attend or" from line 36. Professor Cleary read Definition No. 15 from page 72 of the Model Code. He also read subsection 7 of Rule 62 of the Uniform Rules of Evidence. Mr. Spangenberg moved to strike the words "attend or" from line 36 of Rule 8-01(d). Judge Weinstein moved that Rule 62(7) of the Uniform Rules of Evidence be substituted for proposed Rule 8-01(d).

There was a general discussion concerning the 100-mile limitation contained in the civil rules. Mr. Spangenberg moved that in the evidence rules the minimum standard of unavailability be that the witness is not unavailable if he is subject to subpoena. The motion was carried unanimously.

Dean Joiner moved adoption of provision (1) of Rule 8-01(d). The motion was carried unanimously.

Dean Joiner then moved adoption of provision (3) of Rule 8-01(d) without the words "attend or" in line 36 and with the addition of the words "physical or mental" before the word "sickness" in line 37. The motion was carried unanimously.

Mr. Spangenberg moved that provision (4) of Rule 8-01(d) be adopted to provide that the witness is unavailable if the party offering his hearsay statement has been unable to procure the witness' attendance by subpoena.

Following a general discussion concerning depositions and the provisions of the civil rules, Dean Joiner moved that the language of the Uniform Rules of Evidence be used as modification of being unable to procure the witness' attendance by subpoena. Judge Estes seconded the motion. Judge Estes stated that the motion was that unavailable as a witness be defined as it was in subsection (7) of Rule 62 of the Uniform Rules of Evidence, which he proceeded to read. In effect, this meant substituting Rule 62(7) of the Uniform Rules of Evidence for proposed Rule of Evidence 8-01. Since certain provisions of Rule 8-01 had been approved earlier, Dean Joiner withdrew his motion.

Judge Weinstein moved that the language of Uniform Rule 62(7) with respect to depositions be adopted in principle. Mr. Berger seconded the motion, and it was carried by a vote of 12 to 1.

Dean Joiner moved adoption of the principle of Uniform Rule 62(7)(a). Mr. Selvin moved to amend the motion to provide that what the Committee adopted in principle be not merely exemption, disqualification, or existence of the privilege but that the ground for unavailability be the claiming of the privilege by the witness or by the declarant. Following a short discussion, Mr. Selvin suggested that there be a provision that a declarant is unavailable, if the proponent of the declaration is unable to get the testimony. Professor Cleary read his comment on pages 106-108 of Memorandum No. 19. Mr. Jenner stated that the motion before the Committee was that the reporter redraft provision (4) of proposed Rule 8-01(d) so as to provide that the witness is unavailable if he exercises his privilege to abstain or refuses to testify. The motion was carried unanimously.

Judge Weinstein moved that Rule 8-01(d) be recommitted to the reporter to be drafted along the lines of the policies adopted during the day's discussion. The Committee was in agreement with the motion. Mr. Spangenberg pointed out that the Uniform Rule language covers cases where depositions could have been taken with reasonable diligence, and that perhaps the rules of evidence should cover cases where the witness is unavailable, but if there is an earlier deposition on hand in the court, that that deposition may be used. The reporter made a note of that point.

**PROPOSED RULE OF EVIDENCE 8-03 - HEARSAY EXCEPTIONS: DECLARANT
NOT UNAVAILABLE.**

(a) General provisions.

Dean Joiner moved adoption of subdivision (a) of Rule 8-03. Mr. Haywood inquired if the records showed that in the previous discussion on this subdivision, it had been decided to change the words "Evidence is not inadmissible" to read "Evidence is not to be excluded". The reporter replied that this was correct as was ascertained by a reading of the relevant portion of the Minutes of the December 1967 Meeting.

Mr. Jenner asked the reporter why "assurances of accuracy" was used in one place and "assurance of reasonable accuracy" was used in another. Professor Cleary said that the difference was that the whole thing hinges on the concept that in Rule 8-03 the Committee was dealing with admitting evidence where it makes no difference whether the declarant is available. The justification for that was on the ground that calling the declarant as a witness did not make any difference; if there was evidence available that was as good as the testimony of the witness. He said that in Rule 8-03 the witness did not have to be called; the hearsay statement could come in. Rule 8-04, Professor Cleary said, was drafted upon a different theory. It was designed to cover the situation where the

evidence which is offered is admitted inferior to what would be the result if the witness were called, so that if possible the witness should be produced and called to testify. But the witness is unavailable, so then the question is whether to settle for nothing or allow the hearsay statement to come in. In answer to Mr. Jenner's questioning the use of the phrase "nature of the statement" in Rule 8-03 only, Professor Cleary stated that the phrase also should be included in Rule 8-04(a). A vote was then taken on the motion to adopt subdivision (a) of Rule 8-03 as amended. The motion was carried by a vote of 9 to 2.

In response to Mr. Spangenberg's raising the point of the language changes which had been approved at the December 1967 Meeting, Professor Cleary replied that Rule 8-03(a) as amended and approved would read:

"(a) General provisions. Evidence is not to be excluded under the Hearsay Rule if, notwithstanding the availability of the witness as a declarant, the nature of the statement and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness."

PROPOSED RULE OF EVIDENCE 8-04 - HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE.

Dean Joiner moved approval of subdivision (a) of Rule 8-04 with the words "nature of the statement" added in line 4 after the word "witness". Judge Weinstein moved to strike the word "reasonable" from line 5. The motion was carried by a vote of 5 to 4. Two members abstained from voting.

Judge Estes moved approval of subdivision (a) of Rule 8-04

as amended. The motion was carried by a vote of 10 to 1, and as approved Rule 8-04(a) reads as follows:

"(a) General provisions. Hearsay is not inadmissible under the Hearsay Rule if the declarant is unavailable as a witness, nature of the statement and the special circumstances under which it was made offer assurances of accuracy."

Agenda Item No. 2: MEMORANDUM NO. 20

PROPOSED RULE OF EVIDENCE 3-01. CRIMINAL CASES.

Professor Cleary read subdivisions (a) and (b) of Rule 3-01 as proposed in the first draft on page 1 of Memorandum No. 20 and explained the backgrounds thereof. Judge Weinstein said that there was one possible distinction between provisions (1) and (2). Under (1), he said, all the defendant has to do is submit some evidence, and under (2) if it is the Government which is supporting the basic fact, he supposed that the Government would have to submit evidence sufficient to support a finding of the basic fact. He said that analytically the two things were separable with respect to the weight on the basic fact. Professor Cleary said he would tag the provisions for further consideration.

During the ensuing discussion, Mr. Epton said he wondered if the "unless" clause beginning on line 11 was necessary. Professor Cleary said that there were very troublesome things in connection with presumption. Here you find Congress laying down some rules which say to what effect should be given to certain evidence.

Following a lengthy discussion during which hypothetical cases were presented, Professor Cleary said he felt that in the Congressional cases, there were two respects in which there was a divergence from the ordinary civil pattern - one is that the judge cannot direct the jury to find the presumed fact if they find the basic fact; the other is that the Congressional language precludes the application of the worst in both theory in these cases.

Mr. Solvin felt that in those situations where a presumption is not made, evidence or the equivalent of evidence should not be treated as such. Aspects of the Gainey case were presented.

Following a few brief comments, Judge Sobeloff suggested that line 11 be ended with the word "jury", and that an additional sentence read: "The judge, however, may as in other criminal cases, direct a verdict for the defendant if the judge is satisfied that the explanation leaves the presumption without probative value."

Mr. Berger moved that line 11 be ended with the word "jury"; the remaining language be stricken; and an additional sentence read: "However, the existence of the presumed fact is not a question for the jury, if the judge is satisfied that the evidence as a whole negatives the presumed fact." Judge Estes suggested an amendment to Mr. Berger's language so that the additional sentence would read: "However, the question of the existence of

the presumed fact is not one for the jury, if the judge is satisfied that the evidence as a whole negatives the presumed fact." Mr. Berger accepted the amendment. However, Professor Cleary felt that Mr. Berger's original language was smoother. Mr. Raichle suggested changing the word "negatives" to "dispels", but Mr. Berger did not accept that amendment. Following a short discussion, a vote was taken on Mr. Berger's motion. The motion was lost by a count of 9 to 3.

[The meeting was adjourned on Friday at 5:22 p.m. and was resumed on Saturday at 8:33 a.m.]

Mr. Erdahl moved that the Committee not undertake to formulate such rules, i.e., rules on presumption, in criminal cases. Mr. Jenner read relevant material, with respect to the extension of authority to the Committee, from Evidence Memorandum No. 1. There was a rather lengthy discussion during which the members presented their views on why the Committee should or should not have rules dealing with the subject of presumptions. A vote was taken on Mr. Erdahl's motion, and the motion was lost by a count of 11 to 2.

Mr. Erdahl then moved that in line 11 of subdivision (b) of Rule 3-01, there be substituted for the "unless" clause the following: "subject however to the authority of the judge, as in any criminal case, to enter a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure." He then read Rule 29. Mr. Jenner suggested that the proposed

language have no specific reference to Rule 29, but that the wording be "pursuant to the Federal Rules of Criminal Procedure." Mr. Erdahl accepted the amendment.

Judge Weinstein thought that subdivision (b) would have to be recast. He said there were two problems: first, the reporter had gone too far in purporting to take away both judicial and legislative powers to create other types of presumptions. He thought that there had to be incorporated some kind of a disclaimer to make it clear that legislature can draw rules which do not go this far. The second reason why Judge Weinstein felt that the rule had to be recast was to treat class 1 and 2 motions separately. He would prefer to send the subdivision back to the reporter in order for the language to be laid out in more detail.

Professor Cleary suggested the following language as an addition to subdivision (b) at the end of line 13: "in which case the judge shall withdraw the matter from the jury or enter a judgment of acquittal as may be appropriate."

Dean Joiner said he thought it would be helpful to have the rule written out in great detail. There was a general discussion covering the subjects of proof of insanity and the intentions of the wrongdoer.

Mr. Spangenberg hoped that all inferences could be called presumptions.

In answer to Mr. Berger's question of whether the word "presumption" is used in the statutes, Professor Cleary read the relevant material from page 11 of Memorandum No. 20. There was a discussion concerning instructions given to the jury. Judge Sobeloff suggested, as an amendment to Mr. Erdahl's motion, that the following be added to the proposed language: "or to instruct the jury that the fact presumed has been disproved."

In an ensuing discussion, certain aspects of the Gainey case were presented. Mr. Jenner stated that, in light of the day's discussion, the reporter had decided to redraft subdivision (b) of Rule 3-01 and re-submit it at the May 1968 Meeting. Mr. Epton suggested that there be a definition of presumptions put into the rules. Professor Cleary said that this was done in a measure in subdivision (a) of Rule 3-01. He said that he thought that a separate section on the definition should be avoided because the Uniform Rules contain a definition of presumption. Following further discussion, Professor Cleary said he thought that one further situation ought to be borne in mind. The Committee had been talking about the criminal case wholly in terms of statutory presumptions and Congressional policy. Professor Cleary said that there were also common-law presumptions working in the criminal cases. He referred to cases under the Dyer Act.

Mr. Jenner stated, at this point, that the reporter was going to redraft subdivision (b) in light of viewpoints and suggestions of the Committee.

(c) Instructing the jury.

Professor Cleary read subdivision (c) of Rule 3-01 as proposed in the first draft on page 2 of Memorandum No. 20. Mr. Berger said he thought that the way the rule was written it meant that the judge had to tell the jury about the presumptions. Professor Cleary read the opinion cited on page 16 of Memorandum No. 20, and said that perhaps the language of the rule should be rephrased. Mr. Spangenberg wondered if it might not be wise to use adjectives with the word "presumption" to make it absolutely clear what is meant. During the general discussion, Professor Cleary asked if there was any need for the Committee to get into the problem of conclusive presumptions, since they have no procedural impact. He said it might be of some assistance to state that the Committee was not talking about conclusive presumptions in the proposed rules. Mr. Jenner said that in view of the discussion, he would be hesitant in putting such an important statement in a comment only. It was decided that the reporter would redraft subdivision (c) of Rule 3-01 and re-submit at a future meeting.

V

PROPOSED RULE OF EVIDENCE 3-03 - APPLICATION OF STATE LAW.

Professor Cleary read Rule 3-03 and the alternative thereto as proposed in the first draft on page 22 of Memorandum No. 20 and explained the backgrounds thereof. Dean Joiner moved that the Committee not consider the alternative. Mr. Jenner stated that in view of the comments, the Committee would only discuss lines 1 through 5. Mr. Cleary said there were two problems - 1) the problem of the transferred case in which the Supreme Court has said that the law to be applied is the law of the state of the transferring court, and 2) the problem which arises where there is a conflict situation with no transfer problem but simply the question of whether the proposed language includes the conflict of laws law where the court is sitting.

Judge Sobeloff suggested the following language be used for lines 4 and 5: "shall have the consequences accorded it by the applicable state law. Judge Weinstein suggested: "A presumption respecting a fact which is an element of a state claim or defense shall have the consequences accorded it by state law."

During an ensuing discussion, Professor Cleary suggested the following language: "When an element of a claim or defense has its source in state law or is based on state law". Mr. Berger suggested: "If the claim or defense is based on state law".

He said that he would use the Uniform Rule on presumption in all Federal Tort Claims.

Following a recess, Mr. Jenner stated that the reporter wished to re-examine the basis for Rule 3-02 in light of the discussion and suggestions received, and that a redraft would be presented at a later meeting.

Mr. Spangenberg suggested that there be put into the Rules of Evidence a list of presumptions as a uniform list to be imposed by federal courts, except where they are overridden by state presumptions or by statute or Erie considerations. In the discussion which followed, Professor Cleary said he thought that the Committee should evolve a uniform treatment of presumptions. Mr. Spangenberg said that what he had in mind was only to say what kind of presumptions are covered under certain rules and state the treatment thereof. Mr. Jenner stated that the conversation seemed to have come back to the idea of having some kind of classification of presumptions, and he said that the reporter had agreed to study the matter further.

PROPOSED RULE OF EVIDENCE 3-03 - PRESUMPTIONS IN OTHER CASES.

Professor Cleary read Rule 3-03 as proposed in the first draft on page 27 of Memorandum No. 20 and explained the background thereof. Judge Weinstein felt that the proposed language was a little too cryptic, and he felt that something had to be said about establishing the basic fact, too.

There was a general discussion concerning the laws regarding the manner in which instructions are given to juries with respect to mentioning presumptions. Following Professor Cleary's explanation of how he thought Rule 3-03 would operate, Mr. Jenner suggested that the Committee pass on to Memorandum No. 21

PROPOSED RULE OF EVIDENCE 1-01 - SCOPE.

Professor Cleary read Rule 1-01 as proposed in the first draft on page 1 of Memorandum No. 21. There was a general discussion mainly concerning the extent of the functions performed by United States commissioners and referees in bankruptcy. During the discussion, Professor Cleary said it seemed to him that the Committee needed a provision which exempts certain types of proceedings before commissioners.

PROPOSED RULE OF EVIDENCE 1-01A - APPLICATION OF RULES.

Professor Cleary read subdivisions (a) and (b) of Rule 1-01A as proposed in the first draft on pages 2 and 3 of Memorandum No. 21 and explained the backgrounds thereof. In connection with provision (3) under subdivision (b), he said that there were still several things which had to be researched. He referred the Committee to Rule 54 of the

Federal Rules of Criminal Procedure. Mr. Berger said that in connection with provision (3)(1) beginning at the middle of line 14, he thought that the language was contradictory, because the rules do apply and expressly refer to the determination of questions of fact preliminary to admissibility of evidence. Professor Cleary said the question fundamentally was whether, in passing on a question of admissibility, the judge was bound to observe the hearsay rule. Mr. Berger asked if a judge, in determining a case when he has a preliminary determination prior to the admissibility ruling, could violate the rules of hearsay. The reply was that he could. During the ensuing discussion, Professor Cleary said that the rule was intended to be limited to determinations by the judge. There was a short discussion concerning confessions. Professor Cleary referred the Committee to Rule 1-06 as proposed in the first draft on page 32 of Memorandum No. 21, and he said that with reference to that rule and in light of the morning's discussion, he agreed that Rule 1-01(b)(3)(1) would have to be more pointed.

There was a short discussion concerning affidavits, and Professor Cleary read the provision of Rule 56(e) of the Federal Rules of Civil Procedure. Mr. Jenner said he thought that in some areas the discussion had a thrust which might lead the reporter to further development of Rule 1-01A. Therefore, no final action was taken.

PROPOSED RULE OF EVIDENCE 1-01B - TITLE.

Professor Cleary read Rule 1-01B, as proposed in the first draft on page 18a of Memorandum No. 21, and explained the background. It was left to the reporter to decide which title should be used for the rules.

PROPOSED RULE OF EVIDENCE 1-02 - PURPOSE AND CONSTRUCTION.

Professor Cleary read Rule 1-02, as proposed in the first draft on page 19 of Memorandum No. 21, and his comment thereto. Mr. Spangenberg moved approval of Rule 1-02. There was unanimous approval, and as approved, Rule 1-02 reads:

"Rule 1-02. Purpose and construction. These rules are intended to provide for the just determination of every proceeding to which applicable. They shall be construed to secure fairness in administration and elimination of unjustifiable expense and delay."

PROPOSED RULE OF EVIDENCE 1-03 - UNDISPUTED MATTER.

Professor Cleary read Rule 1-03 as proposed in the first draft on page 21 of Memorandum No. 21 and gave the substance of his comment thereto. Mr. Haywood moved deletion of Rule 1-03, and the motion was carried unanimously.

PROPOSED RULE OF EVIDENCE 1-04 - RULINGS ON EVIDENCE.

Professor Cleary read Rule 1-04 as proposed in the first draft on pages 24 and 25 of Memorandum No. 21. Judge Van Pelt questioned the use of the mandatory "shall" in line 6 of subsection (b) of Rule 1-04. Professor Cleary said that

there had been an omission, as it was not intended to be mandatory. He amended the language by adding the words "on request" before the word "in" at the end of line 5. Mr. Spangenberg said that line 12 in subsection (c) was a little unclear to him. Professor Cleary amended line 12 by striking the words "either through" and substituting "by such means as". Mr. Selvin moved adoption of Rule 1-04 as amended. During a short discussion, Mr. Spangenberg moved to amend line 11 of subdivision (a)(2) of Rule 1-04 so that after the word "record" the language would read "stating the specific ground of objection". Professor Cleary suggested: "In case the ruling is one admitting evidence a timely and specific objection or motion to strike appears of record, so stated as to make clear the specific ground of objection; or". Judge Weinstein moved to approve Rule 1-04 as amended subject to modification by the reporter. The motion was carried unanimously. Subject to modification, as approved Rule 1-04 reads as follows:

"Rule 1-04. Rulings on evidence.

"(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless

"(1) Verdict or finding probably affected. A substantial likelihood appears that the verdict or finding would have been different if the ruling had been otherwise; and either

(2) Objections. In case the ruling is one admitting evidence a timely and specific objection or motion to strike appears of record, so stated as to make clear the specific ground of objection; or

"(3) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

"(b) Record of ruling. The judge may add such ~~other or further statement~~ as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. He may direct the making of an offer in question and answer form, and on request in actions tried without a jury shall do so, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

"(c) Presence of jury. In jury cases, proceedings shall be conducted to the extent practicable, so as to prevent excluded evidence from coming to the attention of the jury, by such means as making offers of proof in their presence or asking questions suggesting the same.

"(d) Plain error. Nothing herein precludes taking notice of PLAIN errors or defects affecting substantial rights although they were not brought to the attention of the judge."

[Mr. Jenner reminded the Committee that the next meeting was to be held on May 23, 24, and 25, 1968. Also, a meeting was tentatively set to be held during the week of August 11th. The meeting was adjourned at 1:32 p.m.]