D-R-A-F-T

MINUTES OF THE MAY 1968 MEETING
of the
ADVISORY COMMITTEE ON RULES OF EVIDENCE

The fourteenth meeting of the Advisory Committee on Rules of Evidence convened in the Ground Floor Conference Room of the Supreme Court Building on Thursday, May 23, 1968 at 8:50 A.M., and was adjourned Saturday, May 25, 1968, at 1:40 P.M. The following members were present:

Albert E. Jenner, Jr., Chairman
David Berger
Hicks Epton
Joe Ewing Estes
Thomas F. Green, Jr.
Egbert L. Haywood
Charles W. Joiner
Frank G. Raichle (unable to attend Saturday)
Herman F. Selvin
Simon E. Sobeloff (unable to attend Friday and Saturday)
Robert Van Pelt
Craig Spangenberg
Jack B. Weinstein
Edward Bennett Williams
Edward W. Cleary, Reporter

Robert S. Erdahl was unable to attend. Professors Albert D. Maris, Chairman, and Charles A. Wright, represented the Standing Committee at the Thursday and Friday sessions of the meeting.

Agenda Item No. 1: Memorandum No. 21,
Article I, General Provisions.

PROPOSED RULE OF EVIDENCE 1-05. EVIDENCE IN OPEN COURT.

Professor Cleary read Rule 1-05 as proposed in the first draft on page 31 of Memorandum No. 21. Dean Joiner moved approval without discussion; Judge Estes seconded the motion. However, the question was raised by Judge Weinstein as to whether application of the rule would prevent the court from holding in camera sessions with the consent of both parties. Of equal importance, said Mr. Williams, was the question of whether the court could hold sessions in chambers without the consent of both parties.

What, inquired Judge Weinstein, was the meaning of the term "open court" (lines 2 and 3) as it related to the rule, and how would the rule effect the right of the court to hold sessions outside of the courtroom. Judges Estes remarked that the term was not significant of its location. Mr. Williams said he had always been under the impression that it meant a court that was open to the public. A discussion ensued as to what constituted a "court," when it might be considered "open," and was the term applicable when the court was moved in a body either to the scene of the crime or to an institution or residence to accommodate a physically disabled witness.

Mr. Williams raised the question of whether the rule as drafted would prohibit a judge from clearing a courtroom to

protect a witness. He added that many judges believed it was within their province to bar spectators from the courtroom in cases involving moral issues, or if the witness was afraid. Under the rule, if approved in its present form, would a judge be constrained to think he did not have the discretionary right to refuse admittance to the public?

Judge Estes commented that a judge could do a great deal to maintain decorum but he couldn't deny a person a jury trial. He added that many judges departed from the Supreme Court ruling that trial by jury is one that is conducted in public, although in so doing, they could jeopardize the validity of the proceedings.

There was a brief discussion on the use of the word "orally" in line 2 as it affected the vocally handicapped witness.

Mr. Spangenberg moved approval of the rule as drafted and was seconded by Judge Estes. Mr. Spangenberg then requested that he be permitted to amend his motion by moving to strike the word "orally" in line 2. Mr. Jenner said the amended motion was out of order. Mr. Spangenberg said he based his objection on the belief that the word "orally" could also be interpreted to exclude visual demonstrations which could be dictated into the record. The Chairman observed that, for the most part, all testimony in a trial is taken orally and in open court but that also, and under

quite normal circumstances (and considering the rules in a body), there would be testimony in certain trials that (a) might not be taken in open court and (b) might not be oral in the generally accepted sense of the word.

Professor Cleary stated that the rule as drafted was simply an attempt to take care of a provision which had been in Rule 43(a) of the Rules of Civil Procedure for thirty years, and a part of Rule 26 of the Rules of Criminal Procedure for almost as long, in order that the latter could be eliminated in the final product.

Mr. Spangenberg's motion for approval of Rule 1-05 as submitted carried by a vote of 6 to 3 (3 members absent and 2 not voting).

Mr. Jenner asked the Reporter to make an observation in his notes that they would again take under consideration the several issues which had not been resolved to the Committee's satisfaction.

Rule 1-05, as approved, reads as follows:

> "Rule 1-05. Evidence in open court. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by act of Congress or by these rules or by the Rules of Civil or Criminal Procedure or Bankruptcy."

PROPOSED RULE OF EVIDENCE 1-06 - PRELIMINARY QUESTIONS OF ADMISSIBILITY.

Professor Cleary gave the background of the first draft of Rule 1-06, as presented on page 32 of Memorandum No. 21

which deals with preliminary questions of admissibility relating to (a) fact or (b) the judicial evaluation of conditions in terms of legally established standards.

(a) General rule.
(b) Relevancy conditioned on fact.

Judge Van Pelt moved approval of subsection (a) as submitted. Mr. Jenner inquired of the Reporter if the three categories[1] drafted into the subsection covered every question that might arise. Professor Cleary replied that it was so intended.

Professor Green asked if (as was stated in the rule) the determination of these issues was within the province of the judge, did this mean that the decision would rest with the judge as to whether a dying declarant was aware of his condition at the time he made his declaration. Professor Cleary said it would, since this related to admissibility of evidence, although neither party would be prevented from presenting to the jury anything that had a bearing on weight and credibility. The Reporter added that the California practice with respect to dying declarations is to instruct the jury to disregard it if it did not believe that the declarant was in expectation of death.

Mr. Selvin said in his opinion the judge should rule on

---

(1) (a) qualification of a person to be a witness; (b) admissibility of evidence; and (c) existence of a privilege.

admissibility, and the California practice of asking the jurors to reject admissible fact complicated their responsibilities, as well as perhaps unduly concentrating a disproportionate amount of attention on what might be just one of the facts or issues in the case. He added that the question of authenticity of the dying declarant's statement had no bearing on the question of whether the declarant did or did not know he was dying.

Professor Cleary said he agreed that decisions relating to admittance or exclusion should rest with the judge and, once admitted, ordinarily there would be no instruction to the jury; however, sometimes exceptional circumstances could arise--these were covered in subsection (b). Mr. Selvin said he understood that subsection (b) was a mandate to the judge, who instructs the jury to disregard the evidence if it finds the condition unfulfilled. Professor Cleary pointed out that this was limited to a particular kind of relevancy situation.

Judge Van Pelt wanted to know if the voluntariness of the confession was to be considered--did it fall within the second sentence of subsection (b). The Reporter said he would not say that an involuntary confession was necessarily irrelevant.

Judge Sobeloff inquired as to the impact of Jackson v. Dennox[1] on the subject, and Professor Cleary replied he believed the Committee's language conformed with the ruling. Professor Green said he thought some interpretations of Jackson required a decision by the judge on the voluntariness of the confession. Judge Estes said he believed it was necessary for the judge, in the presence of the jury, to make that decision; after that, the question was submitted to the jury under the instructions. The Reporter said he didn't think so--under Jackson the judge must make the determination in the presence of the jury but under the practice of the New York Court of Appeals, adopted subsequent to Jackson, and also under the so-called Massachusetts rule, the confession is submitted to the jury, which can disregard it if it finds the confession was involuntary.

Professor Cleary said the salient issue was the matter of instructions to the jury. He was sure everyone would agree that the judge must hold a full hearing and make the determination of admissibility; if the judge admits the confession, then evidence upon the question of voluntariness is admissible before the jury. Under the traditional rule, he said, the weight of the confession was argued before the

(1) Jackson v. Dennox (378 U.S. 368 (1964))

jury and no instructions were given to the jury to disregard if they found the confession was involuntary.

Judge Weinstein was disturbed as to apparent inconsistencies in subsection (b). It was stated in the first sentence that relevance depended upon fulfillment of a condition of fact, which had to be established by a preponderance; therefore, the second sentence was misleading and should be taken out because, as it was worded, the jury could be required to make exclusionary decisions on pieces of evidence out of context, and thus the true nature of the evidence would be distorted and a preponderance could not be established.

The judge cited as an example the question of whether notices of a committee meeting had been received by its members. First, the jury was required to decide (a) whether the secretary had been instructed to mail the preliminary notice, (b) whether she had sent out a reminder, and (c) whether a follow-up telephone call had been made. The question of whether the notices were sent was one of conditional relevance to the question of whether they were received. However, if the jury could not reach a decision as to receipt before it was convinced of (a), (b) and (c), none of which could be established with reasonable certainty, it could not find that the notices had been received. Whereas, if the jury were concerned only with the evidence

that committee members had received advice of the meeting and not with evidence of the means by which this information had been conveyed, a conclusion could be reached with relative ease.

Judge Weinstein said he did not agree with the language of the third sentence, either.

Judge Van Pelt, returning to the matter of confessions, said the jury had to pass on whether the confession of the witness was involuntary or voluntary and, in the latter case, the jury could give it as much weight as it wanted to, and he did not believe the judge should attempt to influence the jury with his findings on voluntary. Judge Weinstein observed that the judge could instruct the jury on the probative course to follow in weighing the evidence.

Mr. Spangenberg said suppose a witness testifies in the preliminary that his confession was obtained under duress, whereupon the arresting officer follows him on the stand and says that no one laid a hand on the prisoner. The judge believes the officer and admits the confession as voluntary. But the attorney for the defense wants the jury to decide the question of admissibility, inasmuch as the witness is covered with bruises. The judge refuses, saying he has already admitted the confession as being voluntary. Now, said Mr. Spangenberg, the way the rule is drafted, under subsection (c), the issue of admissibility is determined

by the judge in the preliminary and he instructs the jury that the confession is voluntary and admissible, thus the matter of relevancy has also been determined by the judge, but subsection (b) on relevancy does not return to admissibility. Mr. Spangenberg said the point he was raising was that the manner in which the confession was obtained was very relevant but, under the rule as it was now drafted, it was not admissible.

Judge Weinstein remarked that an involuntary confession was relevant. But an involuntary confession has no probative value, said Judge Estes, although he agreed with Judge Weinstein that it would be preferable to omit the second sentence if it was misleading. Mr. Berger questioned the wording of the third sentence in subsection (b). If the evidence was complex in nature, as in the illustration given by Judge Weinstein, the jury would have difficulty in making a reasonable finding that the conditions were fulfilled, and he did not see how the matter could become a jury issue in the first place.

Professor Cleary interrupted the discussion to say that Rule 1-06 should not be construed as applicable to confessions, and if the committee decided that the subject should be covered, a special rule would have to be drafted to cover it. The Reporter added that since the Committee believed the present language of subsection (b) was

misleading, it could be amended by inserting the word "all" after the word "if," and in line 13, after the word "issue," inserting the words "of the fulfillment of the condition." On page 23, in line 2, after the word "if," insert the word "all" and in line 3, after the word "issue," insert the words "of the fulfillment of the condition."

Mr. Williams said he believed the bar would read the rule (as presently worded) as covering the rules of confessions. However, in Mr. Williams' opinion, subsections (a) and (b) had to be read together to be understood. Why not say, he suggested, "When the admissibility of evidence is subject to a condition and the fulfillment of that condition is the issue, the issue is to be determined by the judge." He added that a lawyer reading the rule would interpret it to mean that a confession is admissible only on the condition that it is voluntary, and the fulfillment of that condition is an issue in the determination of the admissibility, and it would then read that the issue is to be determined by the judge.

Professor Cleary said that the foregoing discussion definitely indicated that attention would have to be directed in a comment or a note that this rule was not intended to cover the confession situation!

Although he did not entirely disagree with Judge Weinstein, Professor Green said in his opinion, the jury

should not be confronted with the problem of deciding what was and what was not admissible--that question should be decided by a judge. He suggested the addition of the sentence, "The weight of all the evidence is for the jury," at the end of subsection (a) and reference made to it in the notes.

Mr. Wright said the substance of the argument was the choice between the constitutionality question and the evidenciary question. The former ruling was that if an involuntary confession was admitted, there must be a reversal; the evidenciary question, which had constitutional overtones, was: who decides whether or not a confession is involuntary. The Committee could adopt either the orthodox practice by which the decision was left up to the jury, or the Massachusetts practice by which the judge must make a finding and later the jury makes a finding, or the Committee could devise wording that would leave the matter open--it could not, however, ignore the matter.

In response to a question by Mr. Berger, the Reporter explained that the expression "condition of fact" in subsection (b) was one on which the relevance or probative value of the evidence depended--it did not relate to the existence or non-existence of fact but rather to its value or relevance to the case. He added that the Committee would have to reject any notion that the jury had no part in

determining such questions of fact but would have to decide how the situation should be handled.

Mr. Selvin admitted that he, too, was concerned with the language of the second sentence in subsection (b) in that it tended to divert the attention of the jury from the issue of weight to the question of admissibility. He reminded the Committee that one of the first rules stated that "all relevant evidence is admissible," and that the present language of subsection (b) appeared to qualify that statement.

Mr. Selvin went on to say he did not believe this rule was applicable to confessions but that the manner of dealing with them would have to be decided by the Committee.

Dean Joiner agreed that the second sentence of subsection (b) was misleading but said the judge must necessarily tell the jury something at this point. Why not, he suggested, simply have the judge tell the jury to give consideration to all the factors, including the determination of how much weight is to be given the evidence, then instruct the jury to consider whether the condition was fulfilled.
Mr. Berger said that he believed that in Judge Weinstein's illustration where notices of a meeting had been sent to the committee members, it could not be left as a matter of argument of counsel.

Professor Cleary admitted that the California Code was more specific in this respect, and Judge Van Pelt added that

the California Code stated on whom rested the burden of proof and what it was. The Reporter quoted from Section 405 of the California Code and said he thought similar language could be used by the Committee; however, the Code failed to enlighten the judge by what process he was to determine which party had the burden of proof.

Mr. Epton moved approval of subsection (a), since it was not under discussion. It was his belief, he said, that the problem of the judge "running the show" would be solved if subsection (b) was amended to show that the right of the party to introduce evidence relevant to weight or credibility was not limited thereby.

It was a matter of concern to Mr. Raichle that when the initial finding of the judge was refuted by the discovery of new evidence, the jury should not be bound by the preliminary finding. Mr. Green withdrew his suggested addition to subsection (a).

Mr. Epton's motion to adopt subsection (a) as submitted carried by a vote of 12 to 1.

As approved, Rule 1-06(a) reads as follows:

> "(a) General rule. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge."

Mr. Berger, seconded by Dean Joiner, moved to approve sub

subsection (b) as amended by the Reporter. Mr. Epton said he would support the motion if it did not preclude further amendment, as he wanted to move that the second and third sentences be striken from subsection (5). Mr. Spangenberg indicated agreement with Mr. Epton's motion.

The Chair permitted a vote on Mr. Epton's superseding motion, which carried by a count of 7 to 6.

Dean Joiner said he believed the Chair should also vote on the issue, to which Mr. Jenner agreed for the reasons that this was a first draft consideration and the issues were controversial. In the Chairman's opinion the rule was sound and merited further consideration. There ensued a brief discussion on the status of the Chairman as a voting member of the Committee. It was the consensus that the Chair should vote when he felt the issues warranted it. Mr. Jenner indicated that he would have voted against Mr. Epton's motion to delete the second and third sentences of subsection (b); therefore the motion lost.

Mr. Epton then moved approval of subsection (b) as amended by the Reporter. The motion carried by a vote of 7 to 6 (the Chair not voting).

As adopted, Rule 1-06(b) reads as follows:

> "(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If all the

evidence upon the issue of the fulfillment of the condition is such that the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled. If all the evidence upon the issue of the fulfillment of the condition is such that the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.

Before proceeding to the next item, the Committee discussed the effect of Bruton v. United States(1) on rulings on confessions. Mr. Jenner expressed the opinion that the Committee should not, without first giving the matter careful consideration, dismiss the possibility of having a separate rule governing confessions. He added that the Committee's decision might have considerable bearing on Title 2 as it related to trials and confessions. The Reporter said he would appreciate some definite indication from the Committee as to what course it wished to pursue, and Judge Maris replied that he thought that the Committee should move with extreme caution in order to prevent Congressional veto of their efforts.

Judge Estes suggested that a note to the effect that Rule 1-06 was not applicable to confessions should prove sufficient, but Professor Cleary pointed out that since these rules were written for the Federal courts, anyone looking for the treatment of confessions in the State courts

(1) Bruton v. United States (20 L. Ed. 2d 476)

under the 14th Amendment was certainly going to look at this rule and, personally, he deemed it advisable to formulate a separate rule, since the problem of admissibility of a confession was so involved that it could not be effectively incorporated into the present rule. Mr. Jenner concluded the discussion with the request that the Reporter prepare a summation of the Committee's opinions and recommendations for second-round consideration.

The Committee unanimously approved adoption of subsections (c) and (d) as submitted.

Rule 1-06(c) and (d) reads as follows:

> "(c) Presence of jury. Hearings on preliminary questions of admissibility shall be conducted outside the presence of the jury when the interests of justice so require.
>
> "(d) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility."

PROPOSED RULE OF EVIDENCE 1-07 - SUMMING UP AND COMMENT BY JUDGE

Professor Cleary read Rule 1-07 as proposed in the first draft on page 41 of Memorandum No. 21 which, he said, described the permissible Federal court practices as they (for the most part) reflected local practices.

Mr. Raichle made the observation that he could see neither the necessity nor propriety of including this in the rules of evidence. He said it invaded the functions of the jury. Dean Joiner protested that, on the other hand, a

survey conducted by the American Bar Association in 1937 polled strong support of the idea as a means of cutting down on motions for new trials. Judge Maris said this was a rule of procedure and administration, and Judge Weinstein agreed that it did not belong with rules of evidence.

Mr. Haywood also expressed his disapproval and moved that Rule 1-07 be striken from the record. He was seconded by Mr. Spangenberg.

Mr. Williams said that insofar as the judge is empowered to admit or exclude evidence he may to the same extent comment on it. Furthermore, the Committee by omitting the rule, did not prohibit the judge from commenting on the evidence. The Chair agreed that certainly the judge had a right to comment subject to his discretion.

Professor Cleary said he did not believe the Committee would wish to reduce the function of the judge to that of a mere presiding officer. He cited Judge Prettyman's decision in Billeci v. United States[1] that a trial by jury was a trial by twelve men presided over by a judge who has authority to steer the jury in the right direction. Judge Sobeloff pointed out that Judge Prettyman specified that "in exceptional cases" the judge may express his opinion. He thought the rule as presently worded was more liberal and suggested that

(1) Billeci v. United States (184, F 2d 394, 402, 24 A.L.R. 2d 881 (1950))

it be modified to conform more closely to the language used by Judge Prettyman.

Mr. Spangenberg said there was another aspect to be considered in that the judge should make comments on the evidence at the time it was submitted to the jury; any commentary offered by the judge three or four days later would be relatively ineffectual because the factors would have become fixed in the minds of the jurors.

A vote on Mr. Haywood's motion to strike lost by a count of 5 to 6. The Chair did not vote and Judge Weinstein and Mr. Berger were absent from the room. When the judge returned, he indicated that he would have supported the motion, in which case, Mr. Jenner said, the Chair would have registered a negative vote. Mr. Jenner said it was his philosophy to keep matters of importance before the Committee until it had considered the issues carefully and completely.

Mr. Spangenberg moved that the word "comment" be inserted after the word "fairly" in line 3. The Reporter commented that he believed this was implied by the nature of the rule. Mr. Epton said he thought it would be more effective to insert the adjective before the word "sum" in line 3.

Mr. Selvin suggested "fairly and impartially" and Judge Sobeloff moved for the adoption of Mr. Selvin's amendment.

A vote on Judge Sobeloff's motion to adopt Mr. Selvin's amendment to Mr. Spangenberg's motion lost by a count of 3 to 8. (Two members were absent from the room.) The Chair called for a vote on Mr. Spangenberg's motion. The motion lost by a count of 4 to 7.

Following adjournment for lunch, discussion on Rule 1-07 resumed with Judge Van Pelt presiding and ten other members of the Committee present.

Judge Weinstein observed that the word "thereon" at the end of the sentence did not contribute to the meaning of the rule and he moved that it be striken. The Committee voted unanimously to adopt Judge Weinstein's motion.

Judge Weinstein made the further suggestion that in line 5 the words "in view thereof" be striken for the same reason. Professor Wright agreed, remarking that if he had not read the commentary, he wouldn't have had the slightest idea what the phrase meant.

Mr. Spangenberg said he prefered substitution of the word "testimony" for the phrase "in view thereof." Judge Weinstein proposed further that the word "the" following the word "and" in line 4, and the words "of the witness" in line 5, be striken to make it read "upon the weight of the evidence and (upon) credibility."

Professor Cleary said he didn't believe they were talking about the credibility of the evidence. He added that

the phrase "in view thereof" limited the judge's ability to comment on credibility and should be retained.

Professor Green wanted to know if evidence would include demeanor, and Mr. Selvin said that in the appellate courts the judge has just as much right to comment on demeanor as he does on the evidence.

Judge Van Pelt suggested a vote on the insertion of the words "weight and credibility of the evidence" and the elimination of the words following "evidence" in line 4 and everything up to and including the word "thereof" in line 5.

Judge Weinstein moved that the Committee vote on the suggested amendments and was seconded by Mr. Spangenberg. Judge Estes asked Judge Weinstein if he would be satisfied with the deletion of the words "in view thereof" because the meaning of "weight and credibility of the evidence" had more to do with demeanor than it had with documents.

Judge Estes moved that only the words "in view thereof" in line 5 be striken. The Committee voted unanimously to delete the words "in view thereof."

Mr. Spangenberg proposed that in line 4 the words "and credibility" be inserted after the word "weight" and that the phrase "and the credibility of the witnesses" in lines 4 and 5 be striken. A vote on the motion lost by a count of 3 to 4 (Judge Van Pelt and two others not voting, one member not present).

Judge Estes moved that the entire rule be striken, but Mr. Epton said he believed this decision should be postponed until the full Committee was present. (The Chairman, Dean Joiner and Mr. Berger were attending a luncheon.)

Mr. Selvin said he agreed with Mr. Spangenberg's observation that "credibility of the witness" was more limited than "credibility of the evidence" and moved that the words "and credibility" be inserted after the word "weight" in line 4. Judge Van Pelt reminded Mr. Selvin that a similar motion had not been adopted. Mr. Selvin said he had not included deletions of the present language in his motion, and if adopted, it would read, "credibility of the evidence and the credibility of the witnesses."

The vote on Mr. Selvin's motion was 4 to 3, the Chair and 3 members not voting. Judge Weinstein said the motion lost because of disinterest and that a majority of four lacked authority. Judge Van Pelt protested and said those who remained silent were tacitly in the affirmative. A second vote resulted in a 2-2 tie, the Chair and 5 members not voting and one not present.

Professor Cleary said he believed the present wording of the rule was quite susceptible to being read as permitting the judge to comment on the demeanor of the witness, and would the Committee be satisfied with an explanatory note to that effect. He cautioned, however, that if this

was the intent of the Committee, they were "over-turning" Quercia.(1) Judge Weinstein said the court's objection in Quercia was that the trial judge interjected personal knowledge of the witness' weakness, but he did not believe this constituted a general indictment of a judge's comments on demeanor. Judge Van Pelt said further discussion would be postponed until the full Committee was present.

PROPOSED RULE OF EVIDENCE 1-08 - EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION OR WASTE OF TIME

Professor Cleary read Rule 1-08 on page 45 of Memorandum No. 21. The Reporter said this rule had originally been drafted as Rule 4-04 and was to be considered in context with other rules on relevance. It had been moved to its present location because it was closely related to Rule 1-09 on limited admissibility, but he wanted the Committee's opinion as to which location was preferable.

Judge Weinstein moved that the proper placement of rules be determined by the Reporter in the final draft, although he said it had occurred to him that perhaps Rule 1-08 should precede Rule 1-07, because a rule on exclusion of evidence should come before the summing up. Judge Estes seconded Judge Weinstein's motion. The Committee voted unanimously that the placement of Rule 1-08 should be decided by the Reporter.

(1) Quercia v. United States, 289 U.S. 466.

Mr. Spangenberg moved that subsection (b) of Rule 1-08 be included in the section dealing with relevancy. The motion was adopted by a count of 6 to 2 (the Chair not voting and two members abstaining).

PROPOSED RULE OF EVIDENCE 1-09 - LIMITED ADMISSIBILITY

Professor Cleary read Rule 1-09 on page 46 of Memorandum No. 21, and commented that the type of problem encountered here had been raised in the Bruton case. He went on to explain that there were a number of arguments in favor of putting Rules 1-08 and 1-09 together. Under Rule 1-08, evidence could be excluded because it was out of proportion; however, there was the specialized aspect of this type of evidence, where it is taken in for one purpose and may not be properly taken in for another, and the judge presumably bases his evaluation of the situation in terms of Rule 1-08, and if he determines in favor of admissibility, Rule 1-09 provides the limiting instructions.

After some discussion on the applicability of the rule in situations similar to Bruton, Mr. Berger (who had returned to the meeting in company with Mr. Jenner) moved for approval of Rule 1-09. The Committee voted unanimously to adopt.

Rule 1-09 as submitted reads as follows:

> "Rule 1-09. Limited admissibility. When evidence which is admissible as to one party or for one purpose but inadmissible as to another party or for another purpose is admitted, the judge upon request shall

restrict the evidence to its proper scope and instruct the jury accordingly."

PROPOSED RULE OF EVIDENCE 1-07

Mr. Jenner said the Committee would now resume discussion of Rule 1-07 on page 41 of Memorandum No. 21.

Mr. Spangenberg said he had given considerable thought to the previous comments of the Committee members and had come to the conclusion that it was unnecessary to include a rule to codify what was already within the province of the Federal courts, and he doubted that it was a good rule for State courts. He moved that the Committee reconsider the previous motion to strike the rule. Mr. Jenner said the adoption of Mr. Spangenberg's motion would leave the matter open for further action.

The Committee voted unanimously to adopt the motion to reconsider striking Rule 1-07.

Professor Green observed that most states, in adopting Federal rules, had made changes suitable to local requirements. Mr. Spangenberg said if this was so, he believed the Committee should give more substance to the rule for State consideration--as presently worded it was so mild as to be a complete nonentity. For this reason and because he regarded Rule 1-07 as a rule of procedure and not of evidence, Mr. Spangenberg moved that it be striken.

When Judge Weinstein suggested that the States be permitted to write their own requirements as to summation, the

attorney said the idea was acceptable to him.

Mr. Jenner said he believed further discussion would scarcely be profitable and called for a vote on Mr. Spangenberg's motion to strike. The vote was 7 to 7 (the Chair voting). The motion lost.

Mr. Berger immediately moved adoption of the rule with the approved deletions. The motion lost by a count of 7 to 7.

The Chairman remarked that inasmuch as the Committee now had before it a rule which it had refused to either adopt or strike, Rule 1-07 would be tabled for future consideration.

PROPOSED RULE OF EVIDENCE 1-10 - REMAINDER OF OR RELATED WRITINGS, STATEMENTS OR CONVERSATIONS

Professor Cleary read Rule 1-10, page 48 of Memorandum No. 21. The Reporter explained that although this dealt with the so-called rule of completeness, he wanted to focus attention on the departure from the standard practice with regard to the time element. The rule contained the feature present in the deposition rules that when evidence is introduced, it may be presented as a whole, and the party did not have to wait until cross-examination or the introduction of his own case. The question before the Committee concerned the time element, he said; the reason for including it was in the deposition rule and was equally applicable here.

Judge Weinstein questioned the advisability of saying in line 4 that "an adverse party may require." He much

preferred "the court may require," since in line 5 the phrase "or related writing" would enable the defendant during the plaintiff's case to throw the entire case out of order. He added that this was a radical departure from the usual control the judge exercised over the order of approval. Mr. Epton agreed that this requirement would serve to interrupt cases.

A motion was made that in line 4 the phrase "an adverse party may require him" be deleted and the phrase "he may be required" inserted in its place.

Professor Green wanted to know if a strict interpretation could be placed on the word "require"--what if the party had one part of a document but could not locate the other? Then the word "require" could present problems. He suggested insertion of the phrase "within his control" after the word "statement" in line 5.

Mr. Selvin said he believed the Committee should concentrate its efforts in another direction. Why, he wanted to know, should the "party" be required to produce any evidence it does not want to--party (A) had done enough for party (B) by opening up the field and giving (B) a chance to produce whatever was necessary to create a fair impression. In other words, (B) is given the opportunity to make (A) present part of (B)'s case for him and, according to the rule as presently drafted, do it at the start of the trial. Mr. Selvin said

he was opposed to the motion and to the rule as well.

A vote on the motion to amend line 4 carried by a count of 8 to 5 (Chair voting; one member absent). As amended, line 4 reads: " ... he may be required at that time to ...".

Mr. Spangenberg said the rule was broader than he liked, and although the time element might be appropriate in the depositions rule, where all relevant evidence was presented in one document (and he would even agree to a writing or statement which contained all the evidence relevant to a subject), he did not go along with the idea that a "related" statement may be required to come in at the same time. Did it mean a series of letters and replies?

Mr. Berger said he agreed with Mr. Spangenberg that the word "related" was too broad.

Professor Cleary said in preparing the rule he had utilized the language of the Federal deposition rule but had substituted the word "related" for the word "relevant" because the latter had been used heretofore in the technical sense. Mr. Berger suggested that the word "related" be striken and the words "or any other" be inserted so that lines 5 and 6 would read: "he may be required at that time to introduce any other part of any other writing, statement ... " and that the words "relevant to that introduced" in line 6 be deleted and the words "without which that introduced would be incomplete" inserted.

Judge Estes suggested the language of Illinois Supreme Court Rule 212(c): "... which ought in fairness to be considered in connection with the part read or used."

Mr. Berger moved that the words "any other" be substituted for the word "related" in line 5 and that the phrase "relevant to that introduced" be deleted and the phrase "which ought in fairness to be considered in connection with the part introduced" inserted in line 6. Mr. Berger's motion was seconded by Judge Estes.

When the Chairman remarked that the language still did not reflect the spirit of the rule, Mr. Berger amended his motion with respect to the wording of line 6 to read: "which ought in fairness to be considered with it."

Mr. Haywood moved to amend Mr. Berger's motion by striking the word "conversation" from lines 3 and 6, which would limit the scope of the rule to concrete factors; he said that "conversations" covered too broad an area. Dean Joiner concurred, and remarked that he didn't see how the rule as drafted would work with the word "conversations" in it.

Mr. Berger objected to the deletion of any material which would subtract from the completeness of the evidence, the omission of any part of which, he said, could result in an unfair presentation to the jury. Mr. Raichle said according to his understanding of the rule, its purpose was to prevent a piece of evidence from creating the wrong impression.

Further discussion on the purpose and scope of the rule prompted Judge Estes to ask Mr. Haywood if he would amend his motion to include insertion of the word "recorded" before the word "statement" in lines 2 and 5. Mr. Haywood said he would accept that.

Mr. Jenner read lines 5 and 6 as proposed: "... any other part or any other writing or recorded statement which ought in fairness to be considered with it." The Committee agreed with the Chairman that it should be rephrased to read: "... any part of any other writing or recorded statement, etc."

There was a lengthy and indecisive discussion on whether the word "conversations" belonged in the rule and what effect the singular or plural form of "writings" would have on interpretation of the rule.

Mr. Jenner called for a vote on Mr. Haywood's amending motion to strike the word "conversat'on" from lines 3 and 6. The Committee voted to adopt by a count of 10 to 3 (the Chair voting; one member refraining).

Mr. Berger's motion to amend lines 5 and 6 was approved by a vote of 10 to 3.

Mr. Epton's motion to adopt the entire rule as amended was superseded by Mr. Spangenberg's motion to reinsert the word "conversation" in the second sentence. Professor Cleary said that although Mr. Haywood's motion had only included deletion of the word "conversation" from lines 3 and 6, he believed the second sentence was no longer necessary because

the thrust of the rule had been limited. The Committee agreed that the second sentence should be deleted.

Mr. Berger moved for adoption of the rule as amended; Dean Joiner seconded the motion. The Committee voted by a count of 12 to 2 for adoption of Rule 1-10 as amended.

As approved, Rule 1-10 reads as follows:

> "Rule 1-10. Remainder of or related writings, statements or conversations. When a writing or recorded statement, or part thereof, is introduced by a party, he may be required at that time to introduce any part of any other writing or recorded statement which ought in fairness to be considered with it."

Agenda Item No. 2: Memorandum No. 22, Article VIII. Hearsay

PROPOSED RULE OF EVIDENCE 8-01 - DEFINITIONS

(a) Statement.

Professor Cleary read Rule 8-01(a) on page 1 of Memorandum No. 22, the second draft as approved by the Committee at the October 1967 meeting.

Mr. Jenner, who was unable to attend the October 1967 meeting, asked the Reporter if subsection (2) of subsection (a) meant something that was intended to be an assertion--was it a recital? Professor Cleary replied that subsection (a)(2) was non-verbal but intended as an assertion. He explained that the Committee had considered the original language--"conduct of a person, either verbal or non-verbal, is not a statement unless intended by him as an assertion"--as negative in form and had decided that it ought to be stated affirmatively.

The Chairman said he believed that by amending the language the Committee had completely changed the thrust of the rule and wanted to know if a statement was to be considered an assertion whether or not it was intended as such. Judge Estes said the word "assertion" appeared in the Model and California Codes and in some others. A discussion ensued on the exact meaning of the word "assertion" as it related to "oral," "written" or "non-verbal," and as it was defined in the Code. Mr. Jenner pointed out that wherever the word "statement" hereinafter appeared under "hearsay" it was going to mean that it was an assertion.

Dean Joiner moved approval of Rule 8-01(a) as submitted.

The discussion resumed: was a drawing a statement--what about tapes? Mr. Spangenberg wanted to know why the term "non-verbal" conduct was used--why not just "conduct intended by him as an assertion." The Reporter replied that oral statements had to be considered as conduct, too.

The Chairman suggested that perhaps deletion of the words "non-verbal" would eliminate some of the doubt. Judge Weinstein said the words "non-verbal" under subsection (2) implied that subsection (1) was limited to verbal expressions.

Professor Green suggested the words "in other conduct" as a substitute for "non-verbal conduct." The Committee discussed the various ways of communicating without words which could be interpreted as assertions.

It was moved that Rule 8-01(a), lines 3 through 5, be approved as submitted. The Committee voted to approve the subsection as submitted by a count of 8 to 5 (the Chair voting; one member absent).

As approved, Rule 8-01(a) reads as follows:

> "Rule 8-01. Definitions. The following definitions apply under this Article:
>
> "(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if, but only if, it is intended by him as an assertion."

(b) Declarant.

The Reporter read Rule 8-01(b). Dean Joiner moved approval of lines 6 and 7 as submitted. The Committee voted unanimously to adopt.

As approved, subsection (b) reads as follows:

> "(b) Declarant. A "declarant" is a person who makes a statement."

(c) Hearsay.
(1) Testimony at hearing.
(2) Prior statement by witness.

Professor Cleary read subsections (c)(1) and (c)(2) and explained that the Committee had objected to the position taken in the first draft of subsection (c)(2), which had followed the pattern of the Uniform Code and Model Rule in providing that a statement is not hearsay if it is not made by the person who is now present at the trial and available for cross-examination.

Quoting from line 8 on page 1, subsection (c), "Hearsay is a statement offered in evidence to prove the truth of the matter asserted unless"--and the Reporter directed the Committee's attention to subsection (c)(2) at line 14--"the declarant testifies at the hearing and is subject to cross-examination concerning the statement, and the statement is (i)"--and here, the way the Committee reworded it, he said--"inconsistent with his testimony"--they would have to provide some limitations in addition to this, because in the rule as it now appeared, it would only be necessary to call the witness, ask him a couple of questions and then offer his prior statement in evidence. The Reporter said that he did not think this was what the Committee had in mind--that what they wanted was an impeaching statement. The Committee had opened the door to impeachment (and one cannot impeach his own witness), but the rule as drafted provides no control over this situation. The Reporter suggested that the phrase "offered by the opposite party and is" be inserted before the word "inconsistent" in line 2, page 2.

Mr. Berger asked if the Reporter was suggesting that the party who calls the witness would put in a statement inconsistent with what the witness said. That was precisely what he had in mind, the Reporter replied, because that way he gets the statement in. Mr. Raichle said one example was when the government calls in a hostile witness (or one who is

apparently hostile) simply for the purpose of getting his statement on the record.

Dean Joiner objected to the term "opposite party" in the amendment suggested by the Reporter to subsection (2)(i) at line 2. "Opposite" to what, he wanted to know. There had been no prior reference to a party in the rules. Judge Weinstein agreed with Dean Joiner.

Mr. Berger offered a number of substitutes: "the party other than the one who offers the witness" and "offered by someone other than the one who calls the witness."

Professor Cleary said if the Committee was prepared to accept the language of the present draft without change, he was agreeable, but there were two important issues which must be clearly understood: first, under what circumstances may you impeach a witness and, secondly, under what circumstances can a prior inconsistent statement of a witness be taken as substantive evidence--not hearsay. The Reporter added that the Committee was concerned only with the second situation but would have to deal with it within the framework of libel in the first situation. Since the Committee had rejected the first draft, he said, there were a number of approaches still available--all of them more or less limited.

Judge Weinstein said the Committee's objective was to get the truth. What was wrong with questioning a witness

and if at that time he gave you an answer inconsistent with what he had said before, you use that! The witness, the Judge said, was there to be cross-examined--to be tested whether or not he is telling the truth--and if he told the truth before, you use that as evidence-in-chief.

Mr. Raichle asked Judge Weinstein that if he had a written document which was offered before it was sworn to, would he give more credence to the unsworn statement simply because it was prior in time. Judge Weinstein said it didn't have to be a document. Mr. Raichle replied that he was using the document as an illustration, and to use the witness' prior statement, which he now repudiates, as evidence-in-chief and not merely for impeachment--that, in effect, was changing the law.

Mr. Spangenberg said there were exceptions to this and a statement could be admitted for purposes other than impeachment. He moved to adopt Rule 8-01 as drafted through and including the word "testimony" in line 3, page 2.

Dean Joiner moved to adopt the language originally suggested by the Reporter: "Hearsay is a statement offered in evidence to prove the truth of the matter asserted unless the declarant is present at the hearing and is subject to cross-examination concerning the statement ...".

The Chairman called for a vote on Dean Joiner's motion, which lost by a count of 3 to 7 (the Chair not voting and two members not present).

Judge Van Pelt read from an opinion in his circuit, Billings v. United States[1] that "This procedure is approved and an ex parte statement may be substituted for courtroom testimony so long as the witness is present to be cross-examined by the other side."

Judge Weinstein said he would like to see a vote on Mr. Spangenberg's motion to approve the rule as submitted. However, Mr. Berger indicated that he would like to offer some further comment and, since it was late, the Chairman said he could do so when the meeting reconvened the next morning.

The meeting adjourned at 5:35 P.M.

When the Committee met Friday, May 24, 1968, at 9:00 A.M., eight voting members were present. Judge Sobeloff was unable to attend the Friday session.

The Chairman called for a vote on Mr. Spangenberg's motion, made just prior to adjournment of the Thursday session, to adopt Rule 8-01(c)(1) and (2) through and including the word "testimony" in line 3 on page 2 of Memorandum No. 22. The vote was 7 to 1 in favor of adoption, Mr. Epton dissenting.

Before progressing to subsections (2)(ii), (iii) and (iv) of the rule, Professor Cleary suggested that for purposes of

---

(1) Billings v. United States (377 Fed. 2nd 753)

clarification, the words "against him" be inserted after the word "charge" in line 5. (Attorneys Spangenberg, Selvin and Berger arrived at the meeting.) The Reporter added that subsection (2)(ii) dealt with admissibility of former consistent statements offered to refute the charge that the witness was lying.

Mr. Jenner remarked that it might be a matter of concern whether the rule made clear that it was a recent fabrication. Professor Cleary replied that he had used the traditional language--a trial lawyer would understand it.

Judge Estes moved to approve Rule 8-01(c)(2)(ii) as amended by the Reporter through and including the word "motive" on line 6. The Committee voted unanimously to adopt the subsection as amended (11 members voting).

Professor Cleary read subsection (2)(iii) of Rule 8-01 and remarked that he thought it would be improved if the word "then" were inserted after the word "person" in line 7, so that "recent perception" would refer to the time the statement of identification was made and not to the time it was offered.

Prompted by a question from Mr. Raichle, there ensued a lengthy exchange on the different aspects of identification as it related to subsection (2)(iii). The Committee discussed instances of positive identification by a witness, identification subsequently denied, and identification as

influenced by surroundings; i.e., in a courtroom, in a police lineup, etc. The Reporter cited Gilbert v. California[1] in respect to prior identification in a police lineup and the Supreme Court ruling that precautionary measures should be taken under those circumstances, and United States v. De Sisto[2] concerning admissibility of earlier identification as evidence.

Mr. Raichle and Mr. Berger continued to object to the possibility of admitting prior identification by a witness when not under oath in the face of later denial under oath.

Mr. Berger said he seriously questioned the wisdom of admitting extra-judicial evidence as substantive. Mr. Jenner said he thought that all jurors were aware of the extreme importance of identification in either civil or criminal proceedings. Professor Cleary added that the language was traditional and, furthermore, 95% of the Committee's objections had been eliminated by Gilbert.

Judge Estes moved for approval of Rule 8-01(c)(2)(iii) as amended by the Reporter. Mr. Williams, who had but lately arrived, said he could not understand the reason for inserting the word "then" in line 7 on page 2. Mr. Green said he believed that the words "made soon after" were preferable to

---

(1) Gilbert v. California (388 U.S. 263 (1967))
(2) United States v. De Sisto (329 F. 2nd, 929 (2d Cir. 1964))

the words "then recently perceived by him." Judge Weinstein suggested "made soon after his perception." The Reporter asked if the Committee would consider the language of Rule 8-03(b)(21)--"made when the matter was fresh in his memory" or perhaps the phrase "made soon after the person was perceived by him."

Mr. Selvin said he still was confused as to the time element: did it mean that the witness identified the defendant in the lineup soon after he was apprehended and testified to that fact a year later, or was the identification recent, in which case, since the witness was present to testify and is consistent with his prior judicial declaration, subsection (2)(iii) was superfluous. Mr. Williams observed that circumstances surrounding identification could be most important, since a jury of laymen might be very unimpressed with a witness who makes positive identification two years after the incident had taken place. The Chairman agreed that identification was such a perilous subject that it was important to focus on when and how identification was first made.

The discussion continued, as there was general dissatisfaction with the various amendments suggested; some question yet remained as to the time element, and the matter of non-identification was also included in the debate. Finally it was agreed that the Reporter should amend subsection (2)(iii)

to read, "one of identification of a person made soon after perceiving him."

Rule 8-01(c)(2)(iii) was adopted as amended by a vote of 9 to 3.

The Reporter now read Rule 8-01(c)(2)(iv), which went beyond any action previously taken by the Committee but which, he felt, should be considered in view of rulings on the use of prior statements as evidence. Professor Cleary enlarged on the remarks he had made in comments to the rule, and there ensued some discussion among the Committee members on the matter of rulings in De Sisto and in Bridges v. Wixon[1] as related to the section under consideration.

The Reporter pointed out that even though the person repudiates his former statement entirely, nevertheless it was "made under oath, and you have considerable assurance of its accuracy." So this, he said, was an attempt to incorporate these safeguards into the provision allowing a prior statement made at a relevant proceedings to come in if the witness was present and could be placed on the stand and cross-examined.

Mr. Berger said he had reservations about the rule as presently drafted, since in certain criminal proceedings a

---

(1) Bridges v. Wixon (326 U.S. 135, 153-154, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945))

confession could be upheld despite the fact that the witness had repudiated his prior statement under oath, and under subsection (2)(i) the witness could be impeached. Suppose, Mr. Berger said by way of illustration, you had a witness in a criminal case who, while on the stand, denies the part of his testimony which is necessary to convict him. All the prosecution had to do under subsection (2)(i) as presently written, he said, was bring out any prior inconsistent statement and he had impeached his own witness!

Mr. Raichle said he did not believe you should be able to convict on a repudiated statement, whether it was or was not made under oath.

Mr. Williams brought out that since the rule entailed the possibility of impeachment of one's own witness, it must necessarily involve the element of surprise. The Reporter said this rule had nothing to do with surprise, whereupon Mr. Selvin observed that it seemed perfectly clear that this rule was not intended to prevent impeachment, with or without surprise.

Mr. Williams wanted to know the philosophy behind subsection (2)(iv). Professor Cleary explained that it was simply as stated--that a prior statement made under oath was offered in transcript form and was subject to cross-examination, since the witness was present.

Mr. Jenner called for a motion on subsection (2)(iv) and assured the members that questions on issues contained in subsection (2)(i) would again be brought forward for consideration by the Committee.

Mr. Williams moved for adoption of subsection (2)(iv). The motion for adoption of Rule 8-01(c)(2)(iv) as submitted carried by a count of 9 to 4 (Chair voting).

Mr. Berger resumed his argument that subsection (2)(i) as drafted would violate the constitution insofar as criminal cases were concerned. Dean Joiner said he believed this was appropriate evidence, that it was relevant and should, therefore, come into the case.

The Chairman requested a vote reaffirming approval of subsection (2)(i). The motion to reapprove Rule 8-01(c)(2)(i) carried by a count of 10 to 3 (Chair voting).

Mr. Spangenberg moved approval of Rule 8-01(c)(1) and (2). No formal vote was recorded, each subsection having previously been approved separately.

Rule 8-01(c)(1) and (2), as approved, reads as follows:

> "(c) Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter asserted, unless
>
> "(1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing; or
>
> "(2) Prior statement by witness. The declarant testifies at the hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his

testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made soon after perceiving him, or (iv) a transcript of testimony given under oath at a trial or hearing or before a grand jury; or ...".

(c)(3) Admission by party-opponent.

Professor Cleary read Rule 8-01(c)(3) on pages 2 and 3 of Memorandum No. 22. Mr. Haywood moved approval as submitted. The subsection was approved unanimously by the Committee.

Rule 8-01(c)(3) reads as follows:

"(3) Admission by party-opponent. The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, or (ii) a statement of which he has manifested his adoption or belief in its truth, or (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made before the termination of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

(d) Unavailability.

The Reporter read Rule 8-01(d)(1) on page 3 of Memorandum No. 22 with the comment that although the language of subsection (d) was substantially the same as that of Uniform Rule 62(7), there were several differences: for instance, subsection (d)(2) recognized the right of refusal to testify, whereas this provision was not contained in the

Uniform Rules. Mr. Selvin remarked that it did not appear that the witness was exempt but that he was reduced to testifying on the grounds of privilege. However, he continued, if the rule really meant that the witness could refuse to testify because of privilege and his claim was to be upheld, the rule should make this clear. The Reporter admitted that the rule was susceptible of that interpretation.

Mr. Selvin defined "exemption" as meaning that one party has the privilege of precluding the testimony of another but that this privilege need not be exercised; "excluded" meant that one party could stop the other. Professor Cleary said there were two kinds of "privileged" situations, evolving on (1) whether the privilege belongs to the witness or (2) whether it belongs to someone else who exerts it.

There ensued a rather prolonged exchange of ideas on concepts of exemption and privilege, and a number of suggested changes in language were offered that, hopefully, would clarify the Committee's desired interpretation of the rule. Mr. Epton mentioned, "exempted on the ground of claimed privilege"; Judge Estes suggested, "where the privilege is exercised"; and Mr. Green wondered if declining was essential--why not "ruled out by the judge."

After further discussion, the Committee finally agreed on the Reporter's suggestion that the phrase "by ruling of the judge" be inserted after the word "exempted" in line 11.

Mr. Epton moved for approval of subsection (d)(1) as amended by the Reporter. The Committee voted unanimous approval.

Rule 8-01(d)(1) as amended reads as follows:

> "(d) Unavailability. "Unavailable as a witness" includes situations where the declarant is:
>
> "(1) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or ...".

Professor Cleary read Rule 8-01 (d)(2), (3), (4) and (5), all of which were unanimously approved by the Committee as submitted. They read as follows:

> "(2) Persistent in refusing to testify despite an order of the judge to do so; or
>
> "(3) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> "(4) Absent from the hearing and beyond the jurisdiction of the court to compel appearance by its process; or
>
> "(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by process."

The Reporter then read Rule 8-01, lines 10 through 16 on page 4 and lines 1 and 2 on page 5.

Dean Joiner said he thought these lines represented a drafting problem, since the present language appeared to preclude prior testimony in favor of a deposition if the latter was available, when actually prior testimony was preferable. Professor Green outlined a situation where prior testimony

by a witness was agreed upon as being more reliable, and he was not subsequently considered unavailable because his deposition could be used, although it may have been made at a later date when the witness' memory was somewhat less reliable. The Professor thought that unavailability as affecting prior testimony and depositions should be considered separately.

A brief discussion ensued as to how the rule might properly be worded to include prior testimony and depositions. Professor Cleary said one theory was indicated if the witness was unavailable; another if the witness was available and could be produced, when his testimony would be admissible. Professor Green pointed out that the witness had been removed from the unavailable category by the fact that a deposition could be taken.

Dean Joiner said another theory would be to treat prior testimony in depositions as non-hearsay--then you wouldn't have to worry about unavailability. Mr. Selvin said that if the rule was to remain as drafted, a determination would have to be made whether the testimony justified the expense of taking the deposition--the importance would have to be balanced against the expense.

The Reporter, after listening to the discussion, remarked that he was beginning to doubt the wisdom of the language of the rule with reference to depositions. It was

possible, he said, to terminate the rule after the word "testifying" in line 14. Dean Joiner said he agreed.

Mr. Spangenberg moved to place a period after the word "testifying" in line 14 and delete the rest of the sentence.

The Committee voted unanimously to amend Rule 8-01 by placing a period after the word "testifying" on line 14 and deleting all material subsequent to that, including lines 1 and 2 on page 5.

As amended, Rule 8-01, lines 10 through 14 on page 4 of Memorandum 22, reads as follows:

> "A declarant is not unavailable as a witness if his exemption, refusal, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."

The Chairman called for a vote on Rule 8-01 in its entirety. Approval was unanimous.

PROPOSED RULE OF EVIDENCE 8-02 - HEARSAY RULE.

Professor Cleary read Rule 8-02, page 13 of Memorandum No. 22, a first draft as approved without change at the December 1967 meeting.

Judge Van Pelt moved approval as submitted.

The Committee voted unanimously to adopt Rule 8-02 as submitted.

Rule 8-02 on page 13 of Memorandum No. 22 reads as reproduced on the following page.

"Rule 8-02. Hearsay rule. Hearsay is inadmissible in evidence except as otherwise provided by these rules or by the Rules of Civil and Criminal Procedure or by Act of Congress."

PROPOSED RULE OF EVIDENCE 8-03 - HEARSAY EXCEPTIONS.

(a) General provisions.

The Reporter read Rule 8-03(a) as proposed in the first draft without change on page 14 of Memorandum No. 22.

Mr. Raichle objected to the apparent "double talk" in the title. Professor Cleary replied that it was a "positive" resulting from a "double negative." The wording "declarant available" would have been misleading, he said, as indicative that the witness would be required to be available, when in fact it made no difference whether he was or was not available.

Mr. Spangenberg said he still wasn't too happy about the title and Mr. Jenner suggested simply having the title read: "Hearsay exceptions." Mr. Selvin was agreeable to the suggestion. Professor Cleary said there were situations where the declarant was required to be unavailable as a condition precedent to admissibility of his hearsay statement; in this rule there were situations where his availability made no difference, and he thought this should be indicated in the title.

Professor Cleary said he would like to suggest substitution of the words "A statement" for the word "Evidence" in line 2.

Mr. Spangenberg, in reference to the title, suggested the words, "whether or not the declarant is available." Judge Van Pelt said why not employ the language used in the body of the rule--"notwithstanding the availability of the declarant as a witness." Dean Joiner endorsed the Judge's recommendation. In addition, the Dean suggested changing the word "him" in line 7 to "(the) declarant"; deletion of the phrase "notwithstanding the availability of the declarant as a witness" in lines 3 and 4, and the addition at the end of the sentence of the words "even though he is available."

There were no further suggestions, and Dean Joiner moved approval of the rule with his suggested amendments and the Reporter's substituted language in line 2.

The Committee voted approval of the amended language by a count of 12 to 1 (Chair voting).

Mr. Jenner reminded the Committee that no decision had been reached on the wording of the title. Professor Cleary was willing to substitute "availability of declarant immaterial."

The Committee indicated its willingness to adopt the title as amended by the Reporter.

Mr. Spangenberg moved to adopt Rule 8-03(a) as amended. He was seconded by Judge Estes. The Committee voted adoption

of Rule 8-03(a) as amended by a count of 12 to 2.

Rule 8-03(a) as approved reads as follows:

"Rule 8-03. Hearsay exceptions: availability of declarant immaterial.

"(a) General provisions. A statement is not excluded by the hearsay rule if 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, even though he is available."

(b) Illustrations

After reading subsection (b) on page 14 of Memorandum No. 22, Professor Cleary said he understood a number of the members didn't believe that the rule conveyed what they intended; that the words "exemplify the application" were ambiguous because the rule could be interpreted to "exclude" rather than "exemplify" the application. He suggested substituting "the following are examples of statements conforming with the requirements of this rule."

Judge Weinstein recommended eliminating the introductory phrase. The Reporter said the Committee would be subject to criticism if it locked the door on any further development in the hearsay area. He added that this approach gave more assurance that certain evidence would be admitted and less assurance of exclusion of evidence on the grounds of hearsay. Judge Estes cited an opinion of Judge Wisdom that you could find a loophole for admissibility in any recorded case either under the Federal statutes or the

rules of equity; he added that the courts favored a liberal approach. After lunch, with nine members present, the Committee voted unanimously to approve Rule 8-03(b) as amended. Rule 8-03(b) reads as follows:

> "(b) Illustrations. By way of illustration and not by way of limitation, the following are examples of statements conforming with the requirements of this rule."

(b)(1) Present sense impression.

The Reporter read subsection (b)(1) with the comment that this was the language approved by the Committee after exhaustive discussion. Mr. Raichle said he still didn't like the rule as drafted. He objected specifically to the word "explaining" as inappropriate, and Mr. Epton thought it sounded too much like "rationalizing." Professor Cleary suggested "narrates," although he believed the word lacked spontaneity. He preferred "explaining" as being flexible.

The Committee continued to discuss the other possibilities but failed to find satisfactory substitutes for the present language. Mr. Berger moved for approval as submitted. The Committee voted approval of subsection (b)(1) as submitted by a count of 11 to 2.

Rule 8-03(b)(1) on page 14 of Memorandum No. 22 reads as follows:

> "(b)(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

(b)(2) Excited utterances.

The Reporter read lines 1 through 4 on page 15 of Memorandum No. 22. Mr. Spangenberg immediately moved approval as submitted. Mr. Jenner asked Professor Cleary if he meant "caused by perceiving" or "caused by having perceived." Under subsection (b)(1), he said, the Reporter had used the words "while perceiving." Professor Cleary replied that the declarant was under stress caused by having perceived. Judge Weinstein said he thought the word "perceived" should be deleted; furthermore, the way the rule was drafted, if the declarant was under the stress of an exciting event, he could say anything about anything.

Mr. Williams moved that the word "perceived" be striken. Judge Weinstein added that he would also like to have the word "nervous" deleted. Mr. Williams said he had no objection to amending his motion. The Committee voted to delete the words "a nervous" and "perceiving" in lines 2 and 3 on page 15 by a count of 11 to 2 (Chair voting).

Judge Weinstein recommended further amendment by inserting after the word "statement" the phrase "relating to a startling event or condition," and also substituting the word "the" for the article "a" in line 4. Mr. Berger said the word "startling" could be deleted from line 4.

The Committee voted approval of Judge Weinstein's amendment by a count of 8 to 5.

The Reporter asked if the Committee objected to substituting "A" for "Any" in line 1. There was no objection. Mr. Berger moved to adopt Rule 8-03(b)(2) as amended. The Committee voted approval of subsection (b)(2) as amended by a count of 12 to 1 (Mr. Raichle dissenting).

Rule 8-03(b)(2) as amended reads as follows:

"(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

(b)(3) Then existing mental, emotional or physical condition.

The Reporter read Rule 8-03(b)(3) on page 15 of Memorandum No. 22. Dean Joiner moved for approval of the subsection as submitted. The Committee voted unanimously to adopt.

Rule 8-03(b)(3) as submitted reads as follows:

"(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) but not including memory or belief to prove the fact remembered or believed."

(b)(4) Statements for purposes of medical diagnosis or treatment.

Professor Cleary read Rule 8-03(b)(4) on page 16 of Memorandum No. 22. Mr. Williams moved for approval. Adoption by the Committee of subsection (b)(4) as submitted was unanimous.

Rule 8-03(b)(4) as submitted reads as follows:

"(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

(b)(5) Records of regularly conducted activity.

The Reporter read Rule 8-03(b)(5) on page 16 of Memorandum No. 22, and remarked that although the Committee had amended the first draft by inserting the introductory phrase, "Any writing or record, whether in the form of an entry in a book or record," he did not believe it added anything of value to the rule. Furthermore, only writings were included to the exclusion of computerized information. Professor Cleary suggested preliminary language borrowed from Rule 34(a) of the proposed amendments to the Civil Rules of November 1967: "Whether in writing or in the form of a data compilation from which intelligence can be perceived with or without the use of detection devices."

Judge Weinstein asked if the subject would be covered by deleting lines 9, 10 and 11 up to and including the word "as" and have the rule begin with the words, "A memorandum" and inserting the words "in any form" after the word "record" in line 12.

Dean Joiner moved to strike lines 9, 10 and 11 up to and including the word "as" and also to insert the words "or data compilation, in any form" after the word "record"

in line 12. The rule would then begin with the words "A memorandum" on line 11. The Committee voted unanimously to approve Dean Joiner's amendment to subsection (b)(5).

Judge Estes moved to strike the word "diagnoses" in line 12 and insert the word "opinions," since "opinions" was used in connection with the conclusions of experts on all kinds of matters. Mr. Epton said he had made the motion to remove the word "opinions" from the first draft because he didn't think it belonged under hearsay. The Reporter said he believed both terms would be acceptable.

The Committee voted to adopt Judge Estes' amendment to insert the word "opinions" by a count of 12 to 1 (Chair voting and Mr. Epton dissenting). Dean Joiner moved for approval of subsection (b)(5) as amended. The Committee voted unanimous approval.

Rule 8-03(b)(5) as amended reads as follows:

"(5) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

(b)(6) Absence of entry in records of regularly conducted activity.

Professor Cleary read Rule 8-03(b)(6) as proposed in the first draft on page 18 of Memorandum No. 22, and

suggested that in view of the action taken in subsection (b)(5) at line 5, the word "or" preceding the word "records" in line 4 should be striken and the phrase "or data compilations, in any form" inserted after the word "records," and the same should be done in line 7.

Mr. Berger moved for approval as amended, but Mr. Epton said he would like to see the phrase "would ordinarily be made or preserved" inserted after the word "record" in lines 4 and 7. The Reporter said he didn't think it would be appropriate, inasmuch as the rule did not apply to documents generally but to the certification of evidence in the absence of a particular record. He added that he thought the meaning of the rule would be clarified if the word "regularly" were substituted for the word "ordinarily" in line 8.

Judge Weinstein suggested the substitution of the word "included" for the word "mentioned" in line 3. Mr. Berger said in conformity with similar decisions, the words "conforming to example (5) above" in lines 7 and 8 should be deleted. Dean Joiner objected; in order to make subsection (6) pertinent, he said, either the language of subsection (5) would have to be repeated[1] or a cross reference would have to be made to get the same conditions.

---

(1) "A ... record ... made at or near the time by, or some information transmitted by, a person with knowledge, all in the course of a regularly conducted activity."

A vote on Mr. Berger's motion to strike the words "conforming to example (5) above" carried by a count of 6 to 5 (Mr. Raichle was not present for the vote).

The Reporter inquired if the Committee would accept the minor changes he had advocated, and by general agreement, the words "included" and "regularly" were substituted for "mentioned" and "ordinarily" in lines 3 and 8 respectively.

Although there still appeared to be some question as to the wisdom of removing the cross-reference as pertinent to reliability and trustworthiness, on a motion by Judge Weinstein, the Committee gave unanimous approval to subsection (b)(6) as amended.

Rule 8-03(b)(6) as amended reads as follows:

> "(6) Absence of entry in records of regularly conducted activity. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity, to prove the non-occurrence or non-existence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation, /in any form/, was regularly made and preserved."

(b)(7) Public records and reports.

The Reporter read Rule 8-03(b)(7) as it appeared on page 19 of Memorandum No. 22, and recommended deletion of the word "or" in line 2 and insertion after the word "statement" of the phrase "or data compilations, in any form" to conform with subsection (b)(5). Since there had been considerable discussion by the Committee on this section in prior

sessions, Professor Cleary reviewed his comments in the memorandum on subsection (b)(7)(c). Mr. Spangenberg moved approval, and the Committee voted unanimously for adoption.

Rule 8-03(b)(7) as approved reads as follows:

> "(7) Public records and reports. Records, reports, statements, or data compilations, in any form, of public officials or agencies setting forth (a) the activities of the official or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness."

(b)(8) Required reports.

Professor Cleary read Rule 8-03(b)(8) on page 21 of Memorandum No. 22 revised by the Committee at its December 1967 session to include language of California Evidence Code Section 1281 in lieu of the first draft. Mr. Spangenberg moved for approval, and the Committee voted unanimously for adoption as submitted (9 members present).

Rule 8-03(b)(8) as submitted reads as follows:

> "(8) Required reports. Records of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law."

(b)(9) Absence of public record or entry.

The Reporter read Rule 8-03(b)(9) on page 22 of Memorandum No. 22 and suggested changes in lines 2, 5, 6 and 9 to conform with subsections (b)(5), (6) and (7). Judge Estes said that the word "therein" at the end of the

sentence was not needed. It was agreed to delete the cross reference in lines 2 and 3. Judge Weinstein moved approval, and the Committee voted unanimously to adopt the subsection as amended. (Eight members were present for the voting.)

Rule 8-03(b)(9) as amended reads as follows:

> "(9) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, /in any form/, was regularly made and preserved by a public office, agency, or official, evidence in the form of a certificate of the custodian or testimony that diligent search failed to disclose the record, report, statement, data compilation, /in any form/, or entry."

(b)(10) Records of religious organizations.

The Reporter read Rule 8-03(b)(10) on page 23 of Memorandum No. 22, a first draft as approved without change at the December 1967 session. Judge Weinstein moved approval, and the Committee voted unanimous adoption of the subsection as submitted (8 members voting).

Rule 8-03(b)(10) as submitted reads as follows:

> "(10) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts or personal or family history, contained in a regularly kept record of a religious organization."

(b)(11) Marriage, baptismal and similar certificates.

Professor Cleary read Rule 8-03(b)(11) on pages 23 and 24 of Memorandum No. 22 as proposed in the first draft. Judge Weinstein moved for deletion of the cross-reference to

subsection (b)(10) in lines 9 and 10. He was seconded by Judge Estes, whose suggestion of the additional deletion of the words "of fact" in line 9 did not meet with general approval. The Committee unanimously voted for adoption of the amended rule on Judge Weinstein's motion (8 members present).

The meeting adjourned at 5:30 P.M. and reconvened at 8:30 A.M. on Saturday, May 25, 1968, with eleven voting members present.

(b)(12) Family records.

The Reporter read Rule 8-03 (b)(12), the first draft as approved without change at the December 1967 meeting, on pages 24 and 25 of Memorandum No. 22. When he had concluded, Mr. Jenner suggested deletion of the cross-reference in lines 10 and 11 on page 24.

Judge Weinstein said he thought the word "normally" should be inserted before the word "contained" in line 11 and asked why the Committee had approved inclusion of the words "urns" and "crypts" in line 2 on page 25. Mr. Berger wanted to know why the word "rings" couldn't be deleted from line 1 on page 25, and Judge Estes replied that rings were good for identification purposes.

Dean Joiner proposed combining subsections (b)(11) and (b)(12). After a brief discussion, the Committee voted unanimously to approve subsection (b)(12) subject to the

changes discussed and the combining by the Reporter of subsections (b)(10), (11) and (12) for third-round consideration.

(b)(13) Records of documents affecting an interest in property.

Professor Cleary read Rule 8-03(b)(13), a first draft as approved by the Committee at the December 1967 meeting, on page 25 of Memorandum No. 22. Judge Weinstein moved approval without discussion. The Committee voted unanimous approval of subsection (b)(13) as submitted.

Rule 8-03(b)(13) reads as follows:

"(13) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office."

(b)(14) Statements in documents affecting an interest in property.

The Reporter read Rule 8-03(b)(14) on page 26 of Memorandum No. 22. Mr. Epton moved deletion of the "unless" clause beginning in line 6 and continuing through the end of the sentence, since it applied as much to "hearsay" as it did to "weight." Professor Cleary said the rule dealt with non-hearsay and was substantially the language of the Uniform Rule--the purpose being the avoidance of the use of the "wild deed," or to establish the inadmissibility of

"interloping" deeds, which carry no weight. He admitted, however, that old deeds were useful to title examiners in establishing heirships. The Reporter thought the rule would be too loose if the "unless" clause were omitted.

Judge Estes suggested that since the Committee's purpose was to say that this was an exception, its purpose could be accomplished by saying "unless it appears that dealings have been inconsistent"--that would put the burden on the person who is objecting.

Judge Weinstein thought the language placed too great a burden on the judge and made the question of admissibility too complex. Nevertheless, said Mr. Selvin, you had to have some written guarantee of trustworthiness, and the rule as phrased simply provided an extra safeguard against fabrication.

The Chairman asked for a vote on Mr. Epton's motion to place a period after the word "document" in line 6 and delete the rest of the sentence. The motion lost 6 to 6 (the Chair voting).

Mr. Berger moved approval of the subsection as submitted. The Committee voted unanimous approval of subsection (b)(14) without change.

Rule 8-03(b)(14) as submitted reads as follows:

"(14) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property

if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document."

(b)(15) Statements in ancient documents.

The Reporter read Rule 8-03(b)(15) as proposed in the first draft on page 27 of Memorandum No. 22. Mr. Berger moved approval without change. Professor Cleary advised deletion of the cross-reference; the Committee agreed. Mr. Spangenberg said he would put a period after the word "documents" and enclose the words "under Rule 9-02(h)" in parenthethes, thus making the cross-reference part of the rule. The Chairman objected, since this would be the only treatment of that character in the rules.

Mr. Selvin said as far as he could see, a document under the rule was authenticated merely because of age, and by removing the cross-reference, it would include any document that was authenticated regardless of age. Professor Green remarked that the word "ancient" had a legal meaning. Mr. Selvin disagreed. The Chairman intervened--there was a definition of an ancient document in earlier rules. There was not a definition, said Mr. Selvin--there was a provision that documents thirty years old proved themselves.

The Reporter said the caption of the rule in question was "Ancient documents." It provided "Evidence that a document ... (3) is at least 20 years old at the time it is

offered." Then, said Mr. Selvin, there is no precise meaning of "ancient document" in the rule. The Chairman said he would prefer the phrase "as an ancient document under the rules" to the cross-reference.

There were a number of other suggested substitutions, all more or less general in nature. Mr. Spangenberg moved to change the wording to read,"Statements in a document which is an ancient document under these rules." Mr. Selvin remonstrated that the rule was being broadened to include any document. Dean Joiner agreed with Mr. Selvin that the Committee didn't have anything called an "ancient document" in the rules.

Professor Cleary said the problem appeared to be that some of the members felt the rule ought to be saying that "authenticity can be established," but he said it wasn't necessary to establish "authenticity"--it merely had to "qualify" as an ancient document.

The discussion continued apace, covering every phase of authentication and age, and various amendments were offered from time to time. The Chairman finally requested a motion with respect to the text, and Mr. Spangenberg restated his previous motion. The motion lost by a vote of 5 to 6.

Judge Van Pelt moved to amend by saying "Statements in a document more than 20 years old whose authenticity is established." The Committee voted to approve by a count of

8 to 1 (2 members not voting).

Rule 8-03(b)(15) as amended reads as follows:

"(15) Statements in ancient documents. Statements in a document more than 20 years old whose authenticity is established."

(b)(16) Market reports, commercial publications.

Professor Cleary read Rule 8-03(b)(16) as proposed in the first draft on page 27 of Memorandum No. 22.

Mr. Haywood moved approval as submitted. The Committee voted unanimous approval of subsection (b)(16) without change.

Rule 8-03(b)(16) as approved reads as follows:

"(16) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."

(b)(17) Learned treatises.

The Reporter read Rule 8-03(b)(17) on page 28 of Memorandum No. 22 and remarked that the Committee had rejected the first draft, patterned after Uniform Rule 63(31), preferring a redraft which would exempt treatises "to the extent recognized by an expert witness on cross-examination." He went on to explain, however, that there was considerable variation in the pattern of using treatises to cross-examine experts. The rule as drafted, he said, represents the most liberal of these--"established as a reliable authority by admission of the witness"--the view of the Supreme Court

in Reilly v. Pinkus[1] and also in Darling v. Charleston Community Hospital.[2]

For easier reading of the rule, Professor Cleary added that he would like to suggest a re-arrangement of the language by striking the word "his" in line 2 and substituting the word "the" and after the word "attention" add the phrase "of an expert witness." Also in line 2, strike the word "the" preceding the word "cross-examination," and in line 3, strike the words "of an expert witness."

Mr. Epton moved for approval with the suggested changes. Mr. Berger wanted to know what was meant by "established as a reliable authority by admission of the witness or by other expert testimony" in lines 7 and 8. What if the witness would not admit that this was a standard authority? The Reporter replied that under the rule in many states this would block further questioning.

Mr. Spangenberg expressed the opinion that perhaps the Committee was making the rule too restrictive. He explained he was troubled by the word cross-examination--in the medical field, particularly, one could encounter uncompromising attitudes as to which "expert" was an authority. This provoked a lengthy discussion on the considerable variableness of opinion on (a) what constituted an expert in a

---

(1) Reilly v. Pinkus (338 U.S. 269 (1949)).
(2) Darling v. Charleston Community Hospital (33 Ill. 2d 326, 211 N.E. 2d 253 (1965)).

particular field, (b) the treatise as an authority and (c) the extent or limit of cross-examination as used to establish the qualifications of the expert.

Judge Estes moved to delete the words "to the extent called to the attention of an expert witness on cross-examination" in lines 1 and 2. He added that this was not the rule in the majority of states. In Mr. Haywood's opinion the restrictions in the present rule should not be removed. Judge Estes amended his motion to deletion of only the words "upon cross-examination" in line 2. Mr. Berger remarked that he would like to supplement Judge Estes' motion by striking the words "admissions of" in line 7.

The discussion continued: to what extent could a witness rely on books and to what extent should documents be used as opposed to testimony by the witness? Professor Cleary said perhaps the problems could be resolved by saying, "To the extent relied upon by an expert on direct examination or called to his attention on cross-examination." Judge Estes said he would accept that amendment to his motion.

Mr. Berger moved approval of the Reporter's suggested amendment to Judge Estes' motion. The Chairman said if Judge Estes was accepting the amendment to his motion, the rule would read: "To the extent relied upon by an expert witness on direct examination or called to his attention upon cross-examination."

Mr. Epton said he supported Mr. Selvin's argument and much preferred the original draft of the rule.

The Chairman called for a vote on Judge Estes' motion as amended by the Reporter. The Committee voted approval by a count of 6 to 5.

Mr. Berger said he moved substitution of the phrase "established as a reliable authority by the witness" for "admission of the witness." The Reporter suggested that the same result might be achieved by inserting the words "the testimony or" after the word "by" in line 7. Mr. Berger agreed and moved adoption, as amended by the Reporter. Dean Joiner seconded. The motion carried by a vote of 7 to 5 (the Chair voting).

The Reporter said he would prefer to reverse the amended language in the introductory segment of the rule. Mr. Berger moved approval of subsection (b)(17) incorporating the changes suggested by Professor Cleary. The Committee voted approval of the amended subsection by a count of 7 to 5 (the Chair voting).

Rule 8-03(b)(17) as amended reads as follows:

> "(17) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him on direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."

Mr. Haywood and Judge Van Pelt suggested the addition of the words "discipline" and "psychology" to lines 5 and 6. The Committee discussed the merit of adding anything

to the categories already listed in the rule. Mr. Jenner said that in the light of the discussion, further amendments would be taken into consideration at a later date.

(b)(18) Reputation concerning personal or family history.

Professor Cleary read Rule 8-03(b)(18), a first draft approved without change, on page 34 of Memorandum No. 22. Mr. Haywood moved for adoption and Judge Van Pelt seconded.

Subdivision (b)(18) was approved unanimously by the Committee as submitted.

Rule 8-03(b)(18) reads as follows:

> "(18) Reputation concerning personal or family history. Reputation among members of his family by blood or marriage, or among his associates, or in the community, concerning a person's birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, ancestry, or other similar fact of his personal or family history."

(b)(19) Reputation concerning boundaries or general history.

The Reporter read Rule 8-03(b)(19) proposed in the first draft on page 35 of Memorandum No. 22. Judge Van Pelt questioned the comma in line 5 after the word "in." The Reporter said he had been doubtful about it and thought it should be removed, as well as the comma after the word "of" in line 4. Mr. Spangenberg moved approval of the subsection with deletion of the commas in lines 4 and 5. The Committee voted unanimously for adoption.

Rule 8-03(b)(19) as amended reads as follows:

"(19) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located."

(b)(20) Reputation as to character.

Professor Cleary read Rule 8-03(b)(20) proposed in the first draft on page 35 of Memorandum No. 22, and commented that the rules included other references to reputation under relevance and in connection with impeachment of witnesses. Under the latter, the Committee had decided not to include a provision impeaching a witness by proving that he had a bad reputation for truth and veracity, which, the Reporter said, might result in unfavorable comment from small town lawyers because this was a favorite technicality for impeachment in the rural areas. The Reporter said he couldn't put it back in because the Committee had voted its deletion; however, he wanted to bring it to their attention. Mr. Epton moved approval of the subsection as submitted. Subsection (b)(20) was approved unanimously by the Committee.

Rule 8-03(b)(20) reads as follows:

"(20) Reputation as to character. Reputation of a person's character among his associates or in the community."

(b)(21) Recorded recollection.

Professor Cleary read Rule 8-03(b)(21) on page 36 of Memorandum No. 62, which included provisions approved by the Committee at the March 1968 meeting that the recollection of the witness be insufficient to enable him to testify fully and accurately, and limiting the use of the recorded recollection to being "read into evidence" unless offered by the adverse party.

Mr. Epton cited an instance of a man who had made it a practice to write memoranda in connection with his business activities, a practice of which everyone was aware. During the course of a lawsuit in which the man was involved, he suffered a stroke and could not testify to certain information. It seemed to Mr. Epton that since the man was noted for his habit of summarizing business transactions in memoranda, he would not have to deputize someone else to testify to this information. However, he added, it might be that what he was suggesting would broaden the rule too much.

Mr. Jenner said Mr. Epton was presenting an example which was covered by the general provision in subsection (a) of the rule and that subsection (b)(21) referred to the witness who was placed on the stand--the facts must be established by the witness himself.

Mr. Williams said suppose two attorneys, Smith and Jones, attend a conference. When they return to the office, they agree that Smith should write a memorandum of what

transpired. Subsequently, this document is placed in evidence in an important perjury suit against a third party named Brown. Smith has had a stroke and is unable to testify that he prepared the memorandum; however, at the time Smith prepared it, he showed it to Jones, and so Jones says he has an accurate recollection of the document. Jones gets on the stand and testifies that he cannot remember the Conference, but he knows that Smith's memorandum accurately reflects what took place.

Professor Cleary said that perhaps in the original rule the memorandum could go in, but it couldn't qualify under the rule as drafted. Judge Weinstein asked if Jones couldn't lay the foundation by saying that Smith would corroborate. Dean Joiner said that it still wouldn't qualify because the rule says in line 3 "by his own testimony," nor for that matter, he added, can Jones testify that he once had knowledge. Mr. Berger wanted to know if that phrase could be deleted?

Mr. Jenner said the Committee should not make it possible for just any miscellaneous paper that turns up in the file to qualify as admissible evidence.

Mr. Selvin said he thought the Committee's purpose was to provide a means of augmenting a witness' past recollection, not to make a document independent and affirmative evidence.

Professor Cleary said Mr. Williams had raised a very good question: (a) can Jones supply the testimony of Smith

or (b) is Jones a corroborative witness. Mr. Jenner said that either of the examples offered by Mr. Epton and Mr. Williams could get in under subsection (a), but he didn't want to open the door any further under (b)(21).

Dean Joiner said he would like to see it made possible for Smith to present the evidence that was essential to show he had knowledge at that time. Mr. Berger moved to amend by deleting in line 3 the words "by his own testimony" and in lines 6 and 7 deleting the phrase, "by testimony of himself or himself and others."

The Committee voted 7 to 5 to approve Mr. Berger's motion (the Chair voting).

Mr. Williams moved to strike the last sentence (lines 9, 10 and 11) since all the other exceptions to the hearsay rule were written. Judge Estes seconded the motion.

Mr. Spangenberg said another important point to remember was that on matters on which a witness is questioned, the jury just hears the testimony, but written documents go to the jury where they can be read and thus carry more weight. However, it seemed wrong to Mr. Spangenberg that the witness who does remember gets less credit for what he remembers than for what he doesn't remember and must testify to as a document.

Mr. Spangenberg's remark that all tangible evidence is presented to the jury for examination prompted an argument

among the members as to the extent of this practice in the different jurisdictions. Before Mr. Jenner called for a vote on Mr. Williams' motion, Professor Green remarked that perhaps the Committee should have a general rule equivalent to the last sentence.

The vote was 7 to 5 in approval of [illegible] motion to strike the last sentence. [illegible] for adoption of the subsection as amended. [illegible] voted adoption by a count of 7 to 5.

Rule 8-03(b)(21) as approved reads as follows:

> "(21) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has not sufficient recollection to enable him to testify fully and accurately, shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly."

(b)(22) Judgment of previous conviction.

The Reporter read Rule 8-03(b)(22), the first draft approved at the March 1968 meeting, on pages 37 and 38 of Memorandum No. 22. Dean Joiner moved approval as submitted. The Committee voted unanimous approval of subsection (b)(22) as submitted.

Rule 8-03(b)(22) reads as follows:

> "(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution

for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

(b)(23) Judgment as to personal, family, or general history, or boundaries.

Professor Cleary read Rule 8-03(b)(23) on page 39 of Memorandum No. 22. Mr. Spangenberg moved approval. The Committee voted unanimously to approve subsection (b)(23) as submitted.

Rule 8-03(b)(23) reads as follows:

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

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

(a) General provisions.

The Reporter read Rule 8-04(a), on page 40 of Memorandum No. 22, and suggested a change in the language arrangement in conformity with the Committee's action on Rule 8-03, by striking the word "Hearsay" in line 2 and inserting the words "A statement," and striking the words "to be." Also, in line 3 strike the word "under" and substitute the word "by." In line 4, he said, strike the word "and" and in lines 3 and 4 delete the phrase "the declarant is unavailable as a witness."

The Reporter pointed out that the phrase "assurances of

accuracy" was susceptible of being interpreted as requirement for a simple statement, and suggested modification of the word "assurances" in line 6 by insertion of the word "reasonable" inasmuch as the Committee should set a higher than ordinary standard of truth.

Mr. Epton said he would support the Reporter's suggested changes as a motion to amend; Mr. Selvin seconded.

Mr. Spangenberg said he believed "substantial" was a stronger word. Judge Weinstein suggested the word "strong." The Committee rejected the Reporter's motion to insert the word "reasonable" before the word "assurances" by a vote of 4 to 7.

Mr. Williams moved to insert the word "strong" before the word "assurances." He said it was the only adjective that didn't weaken the word "assurances." The vote on Mr. Williams' motion lost by a count of 4 to 5 (the Chair and two members not voting).

Judge Van Pelt said he believed something should be done and moved that the word "reasonable" be inserted in preferance to "strong." The Chairman asked for a revote on the word "reasonable" but could not get a definite commitment to either approve or disapprove Judge Van Pelt's motion.

Mr. Jenner than called for a vote on insertion of the word "substantial" after the word "offer" in line 6. The Committee rejected the word "substantial" by a vote of 5 to 6.

Mr. Berger moved adoption of the rule with all language changes suggested by the Reporter, excepting modification of the word "assurances." Mr. Spangenberg interposed with a motion to reconsider insertion of the word "strong" after the word "offer" in line 6. He was seconded by Dean Joiner. The Committee voted approval of Mr. Spangenberg's motion by a count of 7 to 3 (the Chair and one member not voting).

Although the last vote was decisively in favor of the word "strong" over the other suggested possibilities, the Committee continued to debate the choice of words. To resolve the issue, the Chairman called for another vote. The count was 7 to 5 in favor of Mr. Spangenberg's motion.

Mr. Epton moved for approval of the subsection as amended. The Committee voted 11 to 1 (Professor Green dissenting) for adoption of subsection (a) as amended. Professor Green explained that he disliked the word "strong" as "not making any sense."

Rule 8-04(a) as amended reads as follows:

> "Rule 8-04. Hearsay exceptions: declarant unavailable.
>
> "(a) General provisions. A statement is not excluded by the hearsay rule if the nature of the statement and the special circumstances under which it was made offer strong assurances of accuracy and the declarant is unavailable as a witness."

(b) Illustrations

The Reporter read Rule 8-04(b) as proposed in the first draft without change on page 42 of Memorandum No. 22. In

conformance with Rule 8-03, he suggested the deletion of the words "exemplify the application" in lines 2 and 3, and insertion after the word "following" in line 2 of the words, "are examples of statements conforming with the requirements."

The Committee indicated agreement. Rule 8-04(b), as approved by the Committee, with amendments suggested by the Reporter, reads as follows:

> "(b) Illustrations. By way of illustration and not by way of limitation, the following are examples of statements conforming with the requirements:"

(b)(1) Former testimony.

Professor Cleary read subsection (b)(1) and directed the Committee's attention to his comments to the rule wherein he had advocated separation of this provision from its present location for special treatment in its own rule because here, as a "lead-off" provision and as presently worded, it set too strong a standard of reliability. However, in view of the Committee's action the day before in this connection, and its revision of the preliminary language of subsection (b), he thought "former testimony" could remain where it was.

Professor Green wanted to know what difference there was in the word "strong" as it was used in Rule 8-03 and in the Reporter's comments to Rule 8-04; apparently its effectiveness varied according to its location. The Reporter remarked that the Committee appeared to be concentrating heavily on the word "strong." Judge Estes said it was simply

that the word "strong" had put a lot of weight on admissibility where it had no certain status otherwise.

Mr. Berger moved to strike the words "motive and" in line 11. Mr. Berger's motion was rejected by the Committee by a vote of 1 to 10. Dean Joiner moved approval of subsection (b)(1) without change. Rule 8-04(b)(1), as submitted, was unanimously approved by the Committee.

Rule 8-04(b)(1), approved without change, reads as follows:

> "(b)(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."

(b)(2) Statement of recent perception.

The Reporter read Rule 8-04(b)(2) on pages 44 and 45 of Memorandum No. 22, the original draft of which was rejected by the Committee as being too lenient insofar as unavailability requirements were concerned and because it could lead to specialization by attorneys in the drafting of statements for use by witnesses in the event they became unavailable due to mischance or machination. The Reporter said he felt these discrepancies had now been corrected.

Mr. Jenner suggested to the Reporter that the word "anyone" be substituted for the words, "lawyer or person" in

line 3; he did not like to see a lawyer singled out for special reference in the rule. Judge Van Pelt said he could see no possible objection to the word "person."

The Committee spent some time debating the terminology to be used in the rule and discussing the merits of a variety of suggested changes in the wording of lines 1 through 4 without arriving at any decision as to either.

Professor Green moved to strike the words, "lawyer or" and insert after the words "engaged in" the phrase "investigating, litigating, or settling a claim."

Mr. Selvin said he was prepared to strike the entire subsection, since it appeared that lawyers were going to be disenfranchised as a class.

The Committee voted 7 to 5 to approve Professor Green's amendment to strike the words, "lawyer or" in line 3, on page 44, and insert after the word "in" the phrase, "investigating, litigating, or settling a claim."

Mr. Spangenberg said he was puzzled by the meaning of the words "in good faith" in line 3 on page 45--it was rather loose phraseology and could be variously interpreted to suit the purpose of whoever was making the statement. He said he much preferred the words, "not in contemplation of litigation," which would preclude the possibility of a memorandum made solely for that purpose. Mr. Spangenberg moved to delete the words "in good faith" in line 3 on

on page 45 and substitute the words "and not in contemplation of litigation."

The Committee rejected Mr. Spangenberg's motion by a vote of 5 to 6. Judge Van Pelt said he would accept Mr. Spangenberg's motion if he would retain the words, "in good faith." Mr. Berger moved to insert after the word "faith" in line 3 the phrase, "not in contemplation of his litigation."

The Committee voted approval of subsection (b)(2) as amended by Mr. Berger by a count of 10 to 1 (Mr. Epton dissenting).

Dean Joiner remarked that the rule needed grammatical attention; Mr. Jenner said that this could be left to the discretion of the Reporter and any changes would be brought to the attention of the Committee for third-round consideration.

Rule 8-04(b)(2), as amended, reads as follows:

> "(2) Statement of recent perception. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, narrating, describing, or explaining an event or condition recently perceived by the declarant, in good faith and not in contemplation of his litigation, and made while his recollection was clear."

(b)(3) Statement under belief of impending death.

Professor Cleary read Rule 8-04(b)(3) on page 47 of Memorandum No. 22. Mr. Epton moved adoption without change. The Committee voted unanimous approval of subsection (b)(3) as submitted.

Dean Joiner made a motion to transfer subsection (b)(3) from Rule 8-04 to Rule 8-03, which the Committee voted to reject by a count of 1 to 10.

Rule 8-04(b)(3), as submitted, reads as follows:

> "(3) Statement under belief of impending death. A Statement made by a declarant while believing that his death was imminent."

Judge Estes requested reconsideration of the motion to insert the word, "substantial" in line 6 of Rule 8-04(a). The Chairman said this would be brought up for third-round consideration at the next meeting.

(b)(4) Statement against interest.

The Reporter read Rule 8-04(b)(4) as proposed in the first draft on page 48 of Memorandum No. 22. Dean Joiner moved approval, seconded by Mr. Epton. The Committee voted unanimous approval of subsection (b)(4) as submitted (9 members present).

Rule 8-04(b)(4), as submitted, reads as follows:

> "(4) Statement 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."

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

Mr. Jenner read Rule 8-04(b)(5) on page 48 of Memorandum No. 22, a first draft of sub-items (i) and (ii) as approved without change at the meeting March 1968. The Reporter said sub-item (iii), formerly included in the rule, had been withdrawn and would be resubmitted under proposed Rule 8-05.

Dean Joiner moved transfer of subsection (b)(5) to Rule 8-03. The Committee rejected Dean Joiner's motion by a vote of 2 to 6 (one member not voting).

Judge Van Pelt moved approval of subsection (b)(5)(i) and (ii) without change. The Committee voted unanimous approval of the subsection as submitted.

Rule 8-04(b)(5), as submitted, reads as follows:

> "(5) Statement of personal or family history. (i) A statement 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 stated; or (ii) a statement 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."

PROPOSED RULE OF EVIDENCE 8-05 - HEARSAY WITHIN HEARSAY

The Reporter read Rule 8-05 on page 50 of Memorandum No. 22, which had been inadvertantly omitted from the first draft submission. The title, he explained, indicated the subject, referred to in the Uniform Rules as "Multiple Hearsay "

and in the Model Code as "Double Hearsay." He said he believed the title selected by the Committee was more accurately descriptive.

Mr. Williams remarked that the Committee had spent several days voting on the hearsay rule, and he thought it had managed to effectively abrogate the old concept of exceptions to the hearsay rule. Professor Cleary replied that there were two exceptions: Rules 8-03 and 8-04. Mr. Williams said the Committee had done a lot of revolutionizing, and he didn't believe the phrase "assurances of accuracy conformably with an exception to the hearsay rule" in lines 4 and 5 was particularly meaningful, inasmuch as they had departed appreciably from "hearsay" in the traditional sense. The Chairman suggested adding the words, "provided in these rules" at the end of the sentence.

Mr. Spangenberg advocated striking the word "an" in line 4 and inserting the word "either" before the word "exception." The Reporter observed that what was wanted was not "assurances of accuracy" but that each part of the combined statements should conform with either exception to the hearsay rule.

The various amendments to the rules that had been made during the past two days were discussed by the Committee.

The Chairman said there was a motion to strike the words "has assurances of accuracy conformably with an" in

lines 3 and 4 and substitute the words "conforms with either," and to delete the period after the word "rule" in line 5 and add the words "provided in these rules."

The Committee voted unanimously to adopt the suggested amendments to Rule 8-05. Professor Cleary suggested deleting the words "to be" in line 2. The Committee adopted the Reporter's amendment by a vote of 8 to 1 (one member not voting).

Rule 8-05, as amended, reads as follows:

> "Rule 8-05. Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with either exception to the hearsay rule provided in these rules.

PROPOSED RULE OF EVIDENCE 8-06 - ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT.

The Reporter read Rule 8-06 on page 54 of Memorandum No. 22, which was inadvertently omitted from the original first draft submission.

Mr. Jenner said he didn't think it was necessary to have the words, "the same" at the end of the rule, and proposed that they be deleted. Judge Van Pelt moved to approve the Chairman's suggestion. The Committee voted unanimous approval of Rule 8-06 with the deletion suggested by the Chairman.

Rule 8-06 reads as reproduced on the following page.

"Rule 8-06. Attacking and supporting credibility of declarant. When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked or supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he have been afforded an opportunity to deny or explain."

The Chairman requested that the Committee turn to Memorandum No. 23, Rule 3-01, Criminal cases. Mr. Williams suggested that they defer consideration of this rule until a later date. Mr. Jenner said he accepted the suggestion and requested the Committee to pass on to Memorandum No. 24.

Memorandum No. 24, Article I. General Provisions:

Rule 1-01 Scope.

Mr. Jenner read Rule 1-01 on page 1 of Memorandum No. 24, a first draft, considered at the March 1968 meeting, without change.

Judge Van Pelt moved approval of Rule 1-01 as submitted, seconded by Dean Joiner.

Judge Weinstein thought that perhaps they could eliminate the cross-reference and simply say, "with the exceptions stated in these rules." The Reporter said he would prefer not to eliminate the cross-reference at this time, since it served as a reference as to when and where these rules applied to a specific place. It was a temporary provision

which, in the final compilation, would be eliminated from the rule and placed in the back of the book.

Mr. Jenner restated Judge Weinstein's motion to delete the cross-reference and insert the words, "these rules."

The Committee voted to amend by a count of 4 to 3 (the Chair and one member not voting, and one member not present for the voting).

Rule 1-01, as amended, reads as follows:

> "Rule 1-01. Scope. These rules govern proceedings in the courts of the United States and before United States commissioners, to the extent and with the exceptions stated in these rules."

The Reporter remarked that he considered this a bad vote. He contended that none of the Committee members had had an opportunity to carefully read the material and that therefore, they were proceeding ineffectively at this point.

Mr. Jenner said he would call the Committee's attention to these rules and request that they be given special consideration before the next meeting. He requested that the Committee turn to Rule 1-03 at page 36 of Memorandum No. 24.

Mr. Spangenberg said he would like to return to Rule 1-01, as he thought the rule should be stated simply as one which governs proceedings, and he moved to put a period after the word "commissioners" in line 3 and delete the rest of the sentence.

Professor Cleary objected to the amendment, and the Chairman interrupted to say that since the Committee would

be starting at this point at the next meeting, they would not pursue the matter of amendments at this time.

The meeting adjourned at 1:40 P.M.

Announcement had been made that the next meeting of the Committee would convene at 9:00 A.M. on Thursday, August 8, 1968, and continue for a five-day period through August 12, 1968, and adjourn at 5:00 P.M. on that date. The Chairman announced a second-round clean-up and the Committee would then proceed with third-round consideration of all matters. The Reporter was to rearrange the sequence of the materials in their final form and would prepare a modified commentary.