MINUTES OF THE AUGUST 1968 MEETING OF THE
ADVISORY COMMITTEE ON RULES OF EVIDENCE

The fifteenth meeting of the Advisory Committee on Rules of Evidence convened in the Ground Floor Conference Room of the Supreme Court Building on Thursday, August 8, 1968 at 9:00 a.m., and adjourned Saturday, August 10, 1968 at 2:00 p.m. The following members were present:

Robert Van Pelt (acting as Chairman on Thursday, August 8th)
Albert E. Jenner, Jr., Chairman (absent on Thursday)
David Berger
Hicks Epton
Joe Ewing Estes
Thomas F. Green, Jr.
Egbert L. Haywood
Charles W. Joiner
Frank G. Raichle
Herman F. Selvin
Simon E. Sobeloff
Craig Spangenberg
Jack B. Weinstein
Edward Bennett Williams
Robert S. Erdahl
Edward W. Cleary, Reporter

Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure, attended the Thursday and the Friday afternoon sessions of the meeting. Professor James Wm. Moore, member of the Standing Committee, was present on Saturday.

Professor Cleary opened the meeting by bringing everyone's attention to Article III "Presumptions". (a) Scope. Subsection (a) was unanimously accepted except for line 7. The consensus was that line 7 did not "jive" with the rest of subsection (a). Judge Sobeloff moved subsection (a) be adopted except for line 7. Line 7 was suggested to be inserted into the Note. The motion was carried.

The reporter read subsection (b) Presumptions directed against accused. He stated subsection (b) was an expansion of subsection (a). Judge Weinstein did not think the Supreme Court would support this view. On the "existence of the presumed fact", Mr. Erdahl felt it troublesome. Professor Cleary and Judge Weinstein had a difference of opinion as to the meaning of "reasonable doubt". Judge Weinstein wanted to leave "unless the evidence as a whole negatives the existence of the presumed fact" [lines 3 and 4 on page 2] vague. He thought it should be deleted. He felt the word "negatives" put the burden of proof on the defendant. Professor Cleary disagreed with him on that point; stating, "the burden of proof was not placed on the defendant." Every element of the crime has to be proven beyond a reasonable doubt. Mr. Spangenberg felt a second rule was needed for "presumptions". Judge Weinstein felt there was a definite split [inconsistency] with the Federal Rules.

The term "beyond a reasonable doubt" was brought up. Mr. Selvin read California rules for establishing such "beyond a reasonable doubt" verdicts. He stated there were three types of presumption in the State of California. He thought there should be more than one presumption of "reasonable doubt". Professor Cleary stated "one witness is enough to raise a reasonable doubt." Judge Weinstein made the following suggestion: "Where the Judge must instruct the jury that the existence of a

presumed fact must be proven beyond a reasonable doubt on all the evidence, if the judge finds that no responsible juror could find the existence of a presumed fact beyond a reasonable doubt, then he shall not give the issue to the jury, but shall decide against the Government." Mr. Erdahl moved there be a period at the end of line 2 on page 2 and strike the remainder of the sentence: "unless the evidence as a whole negatives the existence of the presumed fact." Judge Weinstein's suggestion was then made in the form of a motion and carried by a vote of 7 for to 4 against. Dean Joiner felt he could draft a page 2 [in full] to better incorporate Judge Weinstein's suggestion and other comments made by the committee members as to "presumed facts". This is the proposed draft as submitted by Dean Joiner: "or are otherwise established, the existence of the presumed fact is a question for the jury. If the facts which give rise to the presumption are not supported by substantial evidence or otherwise established, or if the evidence as a whole negatives the existence of the presumed fact the judge may direct the jury to find the nonexistence of the presumed fact, or withdraw the question of its existence from their consideration, as may be appropriate. <u>If the presumed fact would assume guilt or an element of the offense, or if it negatives a defense, and if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could not find the existence of the presumed fact beyond a reasonable doubt, the judge shall direct the jury to find the nonexistence</u>

of the presumed fact, or withdraw the question of its existence from their consideration, or enter judgment of acquittal, as may be appropriate." No immediate action was taken on this suggested rewriting. Dean Joiner then proceeded to have the rewritten version typed in a final draft and reproduced for submission to the members.

Rule 3-02. Applicability of State law.

Professor Cleary read Rule 3-02 stating it varied somewhat from the for formulating Professor Wright had suggested in his letter. It was moved this Rule be approved as read. Judge Weinstein questioned "In civil actions". He asked "Is there anything to be gained by this phrase?" Professor Cleary answered Judge Weinstein by stating "there is no theory in the criminal field. This phrase is of definite 'plus value' with the states." Judge Weinstein then gave an analogy as to why "In civil actions" should be taken out. He also felt the Title of Rule 3-02 should be broader. Professor Cleary stated he would like to leave them in. Judge Sobeloff moved to approve the three words [In civil actions] and the rest of the section. His motion was seconded and carried.

Rule 3-03. Presumptions in other cases. P

Professor Cleary read subsection (a) Scope and (b) Effect of presumption. Judge Van Pelt asked for comments or suggestions. There was a motion for approval. Judge Weinstein then stated he thought "greater burden of persuasion" in line 10 on page 18

should be "different burden of persuasion". He stated it was ridiculous to have all the different classifications of " "presumption" that the State of California has. He went on further to say lines 5, 6, 7, and 8 [page 18] give a rule to follow. "Any lawyer can live with that rule in any situation." He said lines 9 and 10 took the rule away. "If you're going to tell a judge what to do, you've told him nothing here."

Professor Green stated " . . . the judge will apply this general rule unless some authority to the contrary be given him in some clear situations where they say by strong evidence or clear proof . . . presumption must be overcome by evidence . . . by a more or less standard phrase." Mr. Spangenberg suggested the members look at the rules and see if it would make good sense to have the different burdens or whether the "country isn't better off with the uniform Federal Rules."

Professor Cleary then suggested the second sentence be deleted. Judge Van Pelt asked Professor Green if he would have any objection to striking the last sentence in subsection (b). Professor Green answered "I don't object to striking it out with regard to the 'greater' burden . . . I'm not quite sure about 'lesser' ones; but, I suppose what will happen is if this is unconstitutional in some instances, we'll find out and something can be done about it in the future.?

Professor Cleary then suggested the committee adopt something that was workable.

It was moved that line 8 beginning "In particular" and ending in line 10 with "persuasion." be stricken. It was seconded and carried by a vote of 11 for to 9 against. It was then moved to adopt the first sentence of (b). This, too, was seconded and carried. The attention of the members was then carried back to subsection (a) Scope [for a motion]. Judge Weinstein wanted to take out "or by these rules" in line 3 because he felt it was inconsistent with "by this rule" in line 4. However, he was satisfied that "not otherwise" in line 2 was sufficient. Then subsection (a) was moved to be adopted as written. This was seconded and carried unanimously.

Subsection (c) Procedure (1) No evidence contrary to presumed fact; (2) Basic facts undisputed; and (3) Evidence contrary to both basic and presumed facts was discussed next. Judge Weinstein stated the captions were not parellel. Also, there are no introductory sentences in each of them. Professor Cleary agreed the captions can be made more accurately descriptive. He then went on tbeexplain all the possibilities of presumed facts./ The first sentence of Subsection (b) Effect of Presumption.was approved with thption change. The motion was made to strike subdivision (4) Cases of greater burden of persuasion of subsection (c) on page 23. This was carried.

Dean Joiner returned to the meeting with his redraft of page 2 [in full through line 13]. The members read Dean Joiner's redraft in silence. Professor Cleary suggested perhaps the rewritten portion should be subdivided to show two different sub-headings as to subjects. Dean Joiner said he felt it was easily understood as he had it written. Judge Maris suggested in the underlined portion "If the presumed fact is guilt" be changed to "If the presumed fact would assume guilt" due to policy. This was put in the form of a motion and carried. It was further added that in line 5 on page 3 the same change should be made for consistency. The motion was made to approve this redraft as amended. It was moved that subsection (c) Presumptions directed against government on page 3 be stricken. It was unanimously carried.

Article I. General Provisions

Rule 1-01. Scope.

Professor Cleary said in order to expedite things, it would be best to read the rules aloud and not the Notes which accompany them. Due to lines 3 and 4 "to the extent and with the exceptions stated in Rule 11-1" Dean Joiner suggested the committee go on "faith" until Rule 11-1 [the cross reference] was discussed. Professor Cleary was asked to remind the Committee to approve Rule 1-01 when Rule 11-1 was brought up. The booklet at this meeting only covered Rules through Article VI. Professor Cleary stated that Article VII was Opinions and Expert Testimony; Article VIII was Hearsay; Article IX was Authentication and Identification; Article X was Contents of Writings, etc.; and, Article XI would be Applicability.

Dean Joiner moved Rule 1-01 be tentatively approved until reexamination. It was unanimously carried. The Committee Note was moved for approval. Mr. Epton suggested the cross-reference [Rule 11-1] be moved closer to Rule 1-01. Professor Cleary stated the Civil and Criminal Rules have a straight numbering system, therefore, he followed to be consistent in the Tentative Final Draft. The motion to approve the Note was carried.

Rule 1-02. Purpose and construction.

Dean Joiner moved approval of this Rule. Judge Weinst suggested striking the "and" in line 1, striking line 2, an striking "proceeding to which applicable. They" in line 3. Then, he suggested, adding at the end of line 7 "and procee justly determined." Judge Weinstein felt this was clearer. Dean Joiner modified his motion to incorporate Judge Weinst suggestion. The motion [including Judge Weinstein's sugges and the Committee Note were adopted.

Rule 1-03. Effect of state rules.

Professor Cleary stated this ruld did not represent hi views. He drafted this rule in response to some suggestion a few of the members of the Committee. He felt this rule represented an undesirable position. After the reporter re from the Civil Rules, Mr. Berger stated he felt this rule destroyed uniformity. Dean Joiner moved the rule be strick Mr. Berger seconded the motion. Judge Weinstein stated he not happy with the language of the Rule, however, he could not think of any way of improving it. He also stated Hanna Plumer, which is set out in the Note, purports "Uniformity in Federal Courts is important where we adopt a rule we ass that the rule is Constitutional and the rule will generally take precedence over Constitutional eerie questions." Also Hanna v. Plumer does not decide what is sound legislative p

Judge Weinstein went on to quote from Hanna v. Plumer: "When we have made a decision, when Congress has ratified it by failing to negate it, this becomes legislative and judicial policy and is prima facie Constitutional." He preferred an escape provision. He stated Hanna v. Plumer did not help at all; it just made the position more difficult. In other words, a decision made by the Committee, if adopted by the Supreme Court, would be the one the Court had to apply without any escape at all. He felt there should be an escape provision that does not overbear too heavily on the State practice.

Mr. Selvin stated he felt the important thing with respect to this Rule was to stop the "forum shopper" because of the accident of diversity.

Professor Green stated he was against this Rule; however, if the rule were adopted, he would not be in agreement with the Note. Judge Van Pelt asked for more comments or suggestions.

Mr. Spangenberg said he felt the Committee should not interfere with the State policies unless there was strong reason to do so. He felt there was strong reason if there were a federal court that recognized the diversity citizenship to say that when one is in that federal court he is trying a case "federal-court-house style". He further stated he felt every convincing argument is on the side of a Uniform Code of

Evidence that will be applied in the same way in every district and every appellate division of the country. Mr. Haywood was in favor of striking this rule. The motion was restated. It was carried by a vote of 8 for and 5 against to strike this rule.

Rule 1-04. Rulings on evidence.

Professor Cleary read the rule. Judge Weinstein questioned "Is it true that (a) Effect of erroneous ruling does not apply where there is a Constitutional Issue as in the legally obtained evidence, etc?" He had some doubt whether this rule should apply where the evidence raises a Constitutional question. Professor Cleary answered that a Constitutional right is a substantial right which is covered in (d) Plain error.

Mr. Williams stated lines 4 through 6 were the precise test that had been formulated for the grant of a new trial on newly-discovered evidence in the federal courts. Dean Joiner suggested from a reading of the Criminal Rules that lines 4 through 6 could be made less harsh by inserting "right of a party is effected" in place of "likelihood appears that the verdict or finding would have been different if the ruling had been otherwise," in (a). Dean Joiner then moved that his previous suggestion be inserted. He stated that he was suggesting this as a sort of compromise to solve everyone's problem. Judge Estes stated this suggestion was in agreement also with the Civil Rules. The motion was put to a vote. It was carried.

Judge Maris questioned "error". He wanted to insert "reversible". Judge Estes stated it might not be "reversible". Dean Joiner moved the Rule be adopted as amended. Professor Cleary stated that by changing subsection (a) as the committee had done and then reading subsection (d), the Rule completely nullified itself. Mr. Berger then drew the attention of the members to Rule 52 of the Federal Rules of Criminal Procedure. He read subsection (a) Harmless error and subsection (b) Plain error. Judge Sobeloff asked why not adopt that exact language. Mr. Berger stated that in Criminal Rules if an error affected a substantial right, it did not have to be brought to the attention of the court. Mr. Williams stated that that language would be subject to abuse. Mr. Spangenberg suggested subsections (a), (b), and (c) having such an impact on evidence should be in the evidence rules. Subsection (d) had nothing to do with evidence. He felt subsection (d) had to do with the Federal Rules of Appellate Procedure. Professor Cleary suggested inserting in the Note that a "Constitutional error is a plain error". Mr. Spangenberg then suggested striking subsection (d). His reason was that it was a rule of appellate procedure. Judge Sobeloff wanted to just rewrite subsection (d). Mr. Spangenberg said he did not think it could be rewritten. Professor Cleary then suggested that "Nothing in this rule precludes consideration of constitutional error". Mr. Berger

suggested adding "Constitutional or other" before the word "substantial" in line 14 of subsection (d). Judge Maris stated that a cross reference could be put into the Note "See Rule etc.". Mr. Berger suggested "or defects" be omitted in line 14 of subsection (d). His suggestion was put in the form of a motion and carried. Mr. Spangenberg then moved that "substantial" be deleted and replaced by "Constitutional" in line 14. Mr. Spangenberg then revised his motion by placing a period after the word "errors" in line 14. The motion was defeated. It was then moved that subsection (d) be approved as amended. The amendment entailed only the deletion of "or defects" from line 14. Judge Weinstein asked about the "Constitutional" aspect. Professor Cleary said it would be put into the Note. The motion was unanimously carried.

Rule 1-05. Evidence in open court.

Professor Cleary referred to Rule 26 of the Federal Rules of Criminal Procedure and Rule 43(a) of the Federal Rules of Civil Procedure, explaining that Rule 1-05 would take portions away from the Rules of Criminal and Civil Procedure having to do with evidence. He asked that the Committee adopt this Rule with the understanding that it is "wide open". Mr. Berger so moved. Mr. Epton made a sub-motion that Rule 1-05 be stricken, because it was already well-taken care of in the Civil and Criminal Rules. Mr. Williams stated he felt the rule should be wider in comprehension than the rules in the Civil and Criminal Rules.

The motion to strike Rule 1-05 was carried. Dean Joiner asked what the posture was of Rules 26 of the Criminal Procedure and 43(a) of the Civil Procedure. It was said by Judge Van Pelt that there would be a motion to reconsider the next day when all the members of the committee were present.

Rule 1-06, Preliminary questions of admissibility. Professor Cleary read the rule. While reading subsection (b) Relevancy conditioned on fact, Professor Cleary suggested inserting "all" after "If" in line 14 to make it clearer. He then went on to subsection (c)Confessions and admissions in criminal cases, stating it was new. He stated that at the last meeting some of the members brought up the subject of confessions and admissions in criminal cases, and he was so instructed to draft subh a subsection. Upon the completion of Professor Cleary's reading of the rule, Judge Weinstein asked if Section 3501 of the Safe Streets Act had been considered. The reporter replied no, because he did not have it at the time of his deafting. jJudge Weinstein then read Section 3501 (which was in conflict with the drafted rule) to the members. Mr. Williams then stated there was another section which was in conflict. That being "an admission could be picked up under the wiretapping provisions of the Safe Streets Act and a motion that was designed to suppress that kind of evidence under the Federal Criminal Rules would

have to be filed before trial; whereas, this [Rule 1-06] gives discretion to the movement to make a point either before or during trial". Professor Cleary then stated Rule 1-06 was written before the Safe Streets Act was "out" and he did not have a copy with which to compare. Judge Weinstein then mentioned lines 6 and 7 on page 20 " . . . the jury may be instructed to disregard it unless they find it to have been made voluntarily." He further stated there was no such provision in Section 3501. Professor Cleary asked what the language was in that respect. Judge Weinstein read "if the trial judge determined that the confession was voluntarily made, it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." This was found to be inconsistent with the laws of Massachusetts. Professor Cleary stated the case of Jackson against Denno sustains the Constitutionality of the provisions in the statute. Judge Weinstein then suggested dropping the entire confession rule because part is covered by statutes and part by Constitutional requirements. Dean Joiner suggested that a preliminary draft be sent out "over the country" to give the Committee some direction in which to go.

Discussion ensued and Judge Van Pelt asked the members if they would like to reconsider subsection (c) after the reporter had had a chance to review it. Dean Joiner stated he had a question on subsection (b) Relevancy conditioned on fact. Judge Van Pelt then stated that (c) would be brought up again the next day. Dean Joiner questioned "all" being inserted in line 14 on page 18. He stated that with "all" being inserted, it left no possibility for evidence to the contrary. Professor Cleary said the first thing being considered was a "prima facie" showing; the next, with all the evidence on the question within "what is the situation"? Dean Joiner said he would like to take "all" out, however, he then felt the sentence would be clumsy. Professor Cleary then suggested that it read: "If after all the evidence upon the issue is in, the jury might reasonably find, etc." Dean Joiner then suggested: "if the jury might reasonably find". Professor Cleary asked if: "If under all the evidence upon . . ." would be acceptable. Mr. Spangenberg stated he felt the rule did not state what the members assume will happen. In other words, he felt the general statement of the rule under subsection (d) Presence of jury would be that the preliminary hearing would be conducted by the judge to find out whether there was enoughtevidence to fulfill the conditinn. He understood the rule to mean that after the judge felt there was enough evidence to fulfill it [the condition] then one has to go ahead and present more evidence to the jury. Professor Cleary then suggested "If under all the evidence . . ." No further discussion was held on this particular subsection.

[The meeting adjourned at 5:05 p.m. until 9:00 a.m. August 9, 1968 with Mr. Jenner presiding.]

Chairman Jenner opened the meeting by asking Judge Van Pelt to "go over" the work of the previous day. Judge Van Pelt stated that Rule 1-05 was "held over" due to the vote of 7 for and 5 against to strike. Professor Cleary then explained that Rule 1-05 was moved to be put closer to the front of the Rules. He further stated no research was done on it. Judge Maris stated he felt that this Rule was court procedure in the jurisdiction of either the Civil or Criminal committees. Professor Cleary stated that both the other committees [Civil and Criminal] labeled this rule under "Evidence". Judge Maris stated this was done by the previous committee before there was an "Evidence Committee". It was then decided the 7-to-5 vote would stand. Rule 1-05 was stricken.

Rule 1-06. Preliminary questions of admissibility.

Dean Joiner stated the Rules should be referred to as numbered in the binder to eliminate confusion. The striking of Rule 1-05 would change all the numbers. Professor Cleary then stated what was done the day before on this Rule. He said he would like to suggest adding "under all" after "If" in line 14 of subsection (b) Relevancy conditioned on fact and strike "is such that" in line 15. He further stated the same change should be incorporated on the following page in lines 3 and 4 for consistency. Dean Joiner suggested [turning to page 19 lines 3 through 6] adding a clause "under all the

evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall not admit the evidence or if it has been admitted he shall instruct the jury to disregard the evidence."

Mr. Selvin stated that if certain things happen, the judge will admit it, if not, the judge will not. Judge Weinstein stated he felt such a suggestion [or Rule] would slow down the trial. His main concern was marking all the evidence to be admitted. Dean Joiner then withdrew his suggestion. Professor Cleary then asked the members if they would like to have the differences of opinion brought out in the Note. Judge Estes and Mr. Spangenberg answered they would. Dean Joiner then suggested that in line 12 on page 18 of subsection (b) that "it" was too far removed from its antecedent "evidence". Professor Cleary explained that to substitute "the evidence" for "it" would be too repetitious. Mr. Haywood then moved that subsection (b) be approved as amended. It was unanimously carried.

Chairman Jenner then went on to subdivision (c) Confessions and admissions in criminal cases. Professor Cleary stated that a discussion was held on this subsection the previous day. He further stated this subsection was written before the Safe Streets Act was approved. He read Section 3501 of Title 18. The Miranda case was brought out. Professor Cleary felt the statute was fundamentally inconsistent with the Miranda case. On the

question of "voluntariness", the reporter suggested abandoning the Massachusetts rule and substituting the more orthodox rule as set out in the statute. "Subsequently," he further stated, "something should be drafted here" but, he did not believe at that point it was practicable to the rule. Dean Joiner asked the reporter in what particular respect in detail his drafted rule conflicted with Section 3501 of the Safe Streets Bill. The reporter answered "It conflicts in fundamentally assuming that there are other grounds of inadmissibility then voluntariness. The Safe Streets bill very specifically says a confession is admissible if it's voluntary." Judge Weinstein stated he felt subsection (c) should be stricken. He felt that what the committee was trying to avoid was a sharp conflict between Congress and the courts on a Constitutional issue. He further stated that the drafted rule assumes that the voluntariness aspect and other aspects are intertwined. Dean Joiner said the committee could redraft the conflicting section of subsection (c) to conform with the Act and have a statute that does not touch the Constitutional problem or the other problems at all, but deals with procedure. Judge Weinstein said it was not only the confession problem that was inconsistent. Mr. Berger moved subsection (c) be stricken. Dean Joiner then suggested changing subsection (c) by placing a period after

"jury" in line 14 on page 19 and striking the balance of that line and striking lines 15 and 16 altogether. On page 20, Dean Joiner suggested striking the first seven lines by placing them in the admission section of the hearsay rule. Mr. Epton then suggested an amendment to Dean Joiner's motion: in lines 8 and 9 on page 19, insert "of evidence" after "to the admission", and striking the balance of the sentence. Professor Cleary referred to Criminal Rule 41(e), which provides suppression of unlawfully seized evidence. He then read the pertinent portion. Professor Cleary then asked Dean Joiner if he had his suggestion correctly stated. On page 19, after changing the comma to a period in line 14, strike the remainder of line 14 and strike lines lines 15 and 16. Also, strike lines 1 through 7 on page 20. Professor Cleary then stated the first sentence on page 20 was consistent with Jackson v. Denno. Dean Joiner said he would change his suggestion to the stricken lines starting with "If the confession . . ." beginning in line 3. He then stated that line 8 would have to be re-edited because "hearing" does not have an antecedent. Professor Cleary said it was all right because of "Testimony given . . . at the hearing". Dean Joiner again agreed. Mr. Williams said he felt there was still a conflict with Dean Joiner's suggestion and Rule 41 of the Criminal Rules. He stated that the present rule as written (proposed Rule 1-06(c)) gives the defendant the option to move

to suppress or object to the admission of the statement either before or during the trial. Under the Safe Streets Act it will be possible for the Government to have statements of the accused that have been electronically taken and which would be subject to a motion to suppression under Rule 41. Such statements are now required to be filed before trial.

Judge Weinstein then gave a hypothetical situation after which Mr. Williams said under the Safe Streets Act one will have situations where electronically seized statements may become usable by the Government. After a further reading of Criminal Rule 41 by Judge Van Pelt, Mr. Williams stated that Rule 41 makes evidence discretionary with the court and the proposed rule gives the court an option.

Mr. Erdahl then referred to Title III of the Omnibus Crime Control and Safe Streets Act which sets up elaborate procedures for judicial authorization for electronic surveillence. He stated: "there is a very special provision parellelling Rule 41 with respect to seized communications." He then read the pertinent portion.

Judge Van Pelt then moved to amend subsection (a) as follows: "Prior to trial if the accused has opportunity, or during trial, if opportunity therefore did not previously exist, an accused may move to suppress or object to the admission in evidence of any confession or statement . . ."

Professor Cleary then stated the motion was in conflict with Criminal Rule 41. Mr. Spangenberg suggested striking lines 8 through 12 on page 19. Mr. Haywood asked Dean Joiner if he was in favor of the amendment by Judge Van Pelt to his previously stated motion. Dean Joiner said he was. The motion to amend as stated by Judge Van Pelt was defeated. Then Dean Joiner's original motion was put into the form of a question. Mr. Spangenberg requested adding to the motion of Dean Joiner to strike lines 8 through "it before trial" in 12. The motion to amend was carried.

Judge Estes then moved that all of subsection (c) be stricken. His basis was that (c) will add nothing but confusion to the Federal Rules of Criminal Procedure and it will further bring the committee into the possibility of submission of jeopardizing all these rules. Dean Joiner disagreed with Judge Estes. He stated that what was left was just good direction to judges and lawyers. The motion to strike all of subsection (c) was defeated. The original motion by Dean Joiner: To strike lines 8 through "it before trial." on 12, in line 14, placing a period after "of the jury" and striking the balance of the page, on page 20, strike line 3 beginning "If the confession . . ." through "been made voluntarily." ending on line 8. The remainder of line 8 through 13 shall remain. Judge Estes suggested that these rules be made applicable to <u>all</u> hearings on objections of

admissibility of evidence. Chairman Jenner again stated Dean Joiner's motion by reading subsection (c) as proposed. Mr. Spangenberg suggested adding "and illegally seized evidence" to line 13 of page 19. Mr. Jenner asked if it was a motion. Mr. Spangenberg answered "I so move". This was found to be included in Rule 41 of the Safe Streets Act. Mr. Spangenberg then withdrew his motion. Mr. Berger then moved amending the pending motion by striking on page 19 beginning "Hearings on . . ." through line 14 "of the jury." On page 20, striking the first three lines. Then he further stated line 8 beginning "Testimony . . ." be redrafted and expanded to embrace "hearings on illegal seizures." Mr. Jenner severed the motion. Dean Joiner stated if the committee continued along the original lines, Mr. Berger's suggestion would not be necessary. Professor Cleary stated he felt the last sentence should be preserved and expanded into the area of a hearing on whether the evidence was unlawfully seized. He further suggested moving the specific section over to a section on "cross-examination". Mr. Jenner then returned to the motion to strike lines 12 through 14 on page 19. Professor Cleary stated he felt it would only be misleading if left in. The motion was put to a question and carried. The second portion of the motion to strike the first sentence on page 20 was put to a question. It, too, was carried. The third portion of the motion [the last sentence on page 20] was put to a question. Mr. Berger moved that it be retained and that the reporter

expand it to embrace "hearings on alleged illegally obtained oral or physical evidence" and if germane that it be moved to a section on "cross-examination" as suggested by the reporter. Mr. Berger's motion was put to a question. Discussion ensued and Mr. Berger further explained his motion. He stated as follows: To adopt as a matter of policy, "Statement of Policy" (1) The rule embraces hearings on confessions, statements, alleged illegally seized property and illegally obtained evidence; (2) The rule applies to preliminary hearings on admissibility of evidence or return of property; (3) It is limited on hearings before or during trial and outside the presence of the jury; (4) The testimony at one of the above hearings given by the accused: (a) is not admissible against him on the issue of guilt; (b) does not render the accused liable to cross-examination as to other issues in the case."

The "statement of policy" motion was put to a question and carried.

Subsection (d) Presence of the jury was brought to the attention of the committee. The reporter stated that because of the striking of subsection (c) he would delete "Other" in line 14 and begin the subsection with "Hearings . . ."

It was moved that subsection (d) be approved as drafted. The motion was carried.

Chairman Jenner then moved on to subsection (e) Weight and Credibility. It was moved subsection (e) be approved as drafted. The motion was carried. Mr. Jenner then stated his attention had been called to the fact that no definite decisions were made regarding subsection (a)General rule on page 18. It was moved subsection (a) be approved as drafted by the reporter. Judge Weinstein moved striking "Rule 4-03 and . . ." in line 9. He felt it was an unnecessary cross-reference. The motion was carried with no discussion.

Mr. Jenner then put the approval as amended motion of the entire section into the form of a question. The motion was carried.

Rule 1-07. Summing up and comment by judge.

There was a motion to approve this rule as drafted. The question was raised as to referring to the judge as "he" in line 5. Mr. Epton moved it be approved subject to the suggestion. It was carried.

Rule 1-08. Limited admissibility.

There was a motion to approve this rule as drafted. Professor Cleary explained this rule was revised from the Uniform Rules. Mr. Jenner then put the motion into the form of a question. The motion was carried.

Rule 1-09. Remainder of or related writings or recorded statements.

Professor Cleary stated almost all the rules appear as approved by the committee. He further stated that if any changes were made by him from the second approved drafting, he would call it to the attention of the committee. Dean Joiner moved for approval as drafted. The motion was carried.

Article II. Judicial Notice.

Rule 2-01. Judicial notice of adjudicative facts.

Professor Cleary stated this rule was as adopted by the committee. He further stated it was without all aspects of judicial notice of the matters of law as not being properly matters of evidence. It was moved Rule 2-01 be approved as drafted. Judge Weinstein suggested subsection (g) Instructing jury would present a problem with respect to the Criminal Rules. He further went on to move that subsection (g) read: "In civil jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed. In criminal jury cases, the judge shall instruct the jury that they may accept as conclusive any facts judicially noticed." It was then suggested that Judge Weinstein's motion be amended to state: "that it may but is not required" in reference to the jury. Judge Weinstein accepted the amendment to his motion. The motion was then put to a question. It was carried. The motion was then made that Rule 2-01 be adopted as amended. It was carried.

The attention of the members was drawn to the "Judicial Notice of Law". After Mr. Jennor suggested it, Judge Weinstein moved that Chairman Jenner present this portion of the tentative final draft to the Civil and Criminal Rules Committees and state the draft was the suggestion of the Evidence Committee accompanied with a memorandum submitted by the reporter in support thereof. The motion was carried.

Judge Van Pelt suggested that this rule also be submitted to the Bankruptcy Rules Committee. This, too, was to be done. Mr. Jenner then proposed the question whether the Committee members wished to include the rule on pages 55 L and M to the other committees also. It was carried.

Rule 4-01. Definition of "relevant evidence".

Professor Cleary stated this rule was the same as originally drafted. Judge Weinstein objected to "the existence of" in line 3. He felt it was "too broad". It was decided Rule 4-01 should be adopted as presented by the reporter. This was put to a vote and carried.

Rule 4-02. Relevant evidence generally admissible, irrelevant evidence inadmissible.

Professor Cleary stated that this rule was the same as originally drafted. Mr. Epton moved for approval. It was carried.

Rule 4-03. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Professor Cleary stated this rule was the same as the

draft which was approved on the second round. Judge Weinstein moved for approval. The motion was carried.

Rule 4-04. Character evidence not admissible to prove conduct; exceptions.

Professor Cleary suggested, after Mr. Jenner read the title of subject rule, that "; other crimes" be added at the end of the title. Mr. Berger moved approval as submitted and amended by the reporter. The motion was carried.

Rule 4-05. Methods of proving character.

Professor Cleary stated this rule was as adopted by the committee pending Rule 6-08(b) which deals with the treatment of witnesses. It was moved by Mr. Berger to approve this rule subject to pending Rule 6-08(b). The motion was carried.

Rule 4-06. Habit; routine conduct.

Professor Cleary suggested changing "conduct" in the title to "practice". Mr. Berger moved approval of the title as changed and approval of the rule. The motion was carried.

Rule 4-07. Subsequent remedial measures.

This rule was drafted as approved by the committee. Mr. Berger moved approval. Judge Weinstein felt subject rule was unnecessary and should be omitted. However, the motion for approval as drafted was restated and carried.

Rule 4-08. Compromise and offers to compromise.

Professor Cleary had no comment on this rule. Mr. Epton suggested adding "investigation or" before "prosecution" in line 14. He then changed his suggestion into the form of a motion. The motion was carried.

Dean Joiner asked the reporter if he thought the language of the Rule was sufficiently clear that would permit the introduction of evidence of the negotiations that went on during the compromise, the statements made, etc., in an action for fraud to set aside compromise. In answer, the reporter gave some hypothetical examples in support of the draft.

It was moved Rule 4-08 be approved as amended. The motion was carried.

Rule 4-09. Payment of medical and similar expenses.

[This is as approved in the second draft.] Mr. Selvin moved it be adopted as drafted. The motion was carried.

Rule 4-10. Offer to plead guilty; withdrawn plea of guilty.

Dean Joiner asked if the word "trial" in line 5 intended to embrace a criminal trial as well as a civil trial. He moved that if it was, the word "criminal" should be inserted before "crime" in line 5. He clarified that he wanted it [an offer of or a plea of guilty or nolo contendere] to be applicable as non-admissible in criminal cases. Mr. Berger agreed that it should be admissible in civil cases.

Dean Joiner restated his motion of inserting "criminal" before "crime" in line 5. The motion was defeated. Mr. Haywood then moved adoption of Rule 4-10 as drafted. Mr. Jenner stated his interpretation of the views of the members who voted against

Dean Joiner's motion. Mr. Haywood then revised his motion that line 5 be changed by reading as: "not admissible in a trial involving the party of the defendant who made". Mr. Berger asked Mr. Haywood to supplement "not admissible against the party or defendant who made". Mr. Haywood stated he did not accept the suggestion. Mr. Jenner then restated the original motion to Mr. Haywood. Mr. Berger moved an amendment to it. His stated motion was to have line 5 read: "not admissible in the trial of the defendant against the party who madde". More discussion was heard. It was then decided line 6 should be amended to read: "the plea or offer, in any proceeding, civil or criminal". Mr. Epton was against this amendment. The motion to amend Mr. Haywood's motion was put to a question. There was a vote of 6 for and 6 against. Mr. Jenner was against the motion. He felt the language could be improved. The motion was defeated by decision of the Chairman. Mr. Jenner asked Mr. Haywood to restate his original motion: "not admissible in a civil or criminal proceeding involving the person who made" wasto be line 5. His motion was carried by a vote of 8 for and 4 against.

Judge Van Pelt moved that in line 2 "of a plea of guilty or nolo contendere," and in line 3 "later withdrawn, or" and from line 6 "plea or" be deleted. Dean Joiner seconded the motion. Professor Cleary offered a hypothetical case wherein

a plea of guilty is offered in a criminal case. His example was against Judge Van Pelt's motion. Judge Van Pelt then stated that if his motion were carried, he would then move that a clause be added to prohibit a plea of guilty to come into a criminal case. Mr. Jenner put the motion to a vote. It was defeated by 3 for and 9 against. Dean Joiner then moved "but such a plea or offer may be admitted for purposes of impeachment." be added at the end of the drafted rule. Mr. Jenner stated the motion was out of order because it was included in the last defeated motion. Mr. Jenner, however, put the motion to a vote. It was defeated. Mr. Jenner then asked for a vote on the rule as amended. The motion was carried to approve. Mr. Jenner then stated the amended portion of the rule adding that a comma was to be placed at the end of line 2. Dean Joiner and Judge Weinstein then stated they felt "nolo contendere" in line 2 was in the wrong place. Dean Joiner then moved that "later withdrawn," in line 3 be placed after "plea of guilty" in line 2. Mr. Jenner suggested "a plea of" be inserted after "plea of guilty or" in line 2. The motion was carried. Mr. Jenner read the rule as amended for the record. "Rule 4-10. Offer to plead guilty; withdrawn plea of guilty. Evidence of a plea of guilty later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, is not admissible in a civil or criminal proceeding involving the person who made the plea or offer." Dean Joiner suggested "or nolo contendere" be inserted in the title. The reporter replied he had done so.

Rule 4-11. Insurance.

Professor Cleary stated this draft was as approved from the second draft. He further stated that as originally drafted, this rule was limited to liability insurance. Mr. Berger moved the addition of "motive" before "agency" in line 6. Professor Cleary stated that would not solve anything. Then, Mr. Berger suggested placing "or motive" after "of a witness" in line 7. Mr. Berger, after discussion from Professor Cleary and Mr. Williams on the Uniform Rules of Evidence, withdrew his motion and moved "against liability" be inserted after "was not insured" in line 2. Professor Cleary questioned if that was to include line 4 [the insertion of "liability" before "insurance"]. Mr. Berger answered yes. Mr. Jenner put the motion to a vote. The motion was carried.

The motion to approve this rule as amended was carried.

Article V. Privileges.

Rule 5-01. Privileges recognized only as provided.

The motion was made to approve this rule as drafted. It was carried.

Rule 5-02. Required reports privileged by statute.

Judge Estes questioned the applicability of this rule if there was a federal statute which required the information be given. Dean Joiner moved "refuse to disclose and to" be stricken from line 3. He felt this would give the person making

a return or report required by law a privilege. With no discussion heard, Mr. Jenner then put Dean Joiner's motion to a vote. It was carried by a vote of 7 for and 4 against.

Dean Joiner moved approval of the rule as amended. Professor Cleary stated he felt the first sentence was slightly ridiculous. He suggested preserving only the second sentence. Mr. Epton moved the committee reconsider the action taken on Dean Joiner's motion. Mr. Epton's motion was carried. Mr. Jenner then restated Dean Joiner's motion. The vote was 5 for and 7 against. Dean Joiner moved an addition at the end of the drafted rule: "If the person making the return or report is involved in litigation, as to which the facts stated in the return or report are relevant, the return or report is not privileged." The vote was 4 for and 5 against. Judge Estes then proposed an amendment to provide that it not be privileged in an action involving facicity or fraud in such statements. He then moved that the rule be amended: to provide that the return or report is not privileged in an action directly involving fraud or a false statement in the return or report. The motion was carried. Mr. Spangenberg moved for reconsideration. The vote on his motion was 5 for and 7 against. It was then moved Rule 5-02 be approved as amended. Mr. Jenner read aloud the rewritten version of Rule 5-02 as amended. "No privilege exists under this rule in actions directly involving false statements or fraud in the return or report." The motion was carried. The last amendment is to follow the drafted rule.

Rule 5-03. Lawyer-client privilege.

It was moved to approve the rule as drafted. Mr. Epton questioned "attested" on line 15 on page 144. He wanted to know if this included "acknowledged". Dean Joiner suggested commas be inserted in line 14 before the first "or" and after "thereto". The motion was made to approve as amended by insertion of the commas. The motion was carried.

Rule 5-04. Psychotherapist-patient privilege.

Professor Cleary stated this rule was as approved in the second drafting. Mr. Spangenberg stated he felt the privilege should be limited to only the patient and his psychotherapist or the patient and persons who participate in his diagnosis. He then suggested changing line 11 on page 157 to read: "or persons who are participating". He then stated his suggestion as a motion. In addition, changing the word "his" to "the" in line 12. After further discussion, it was decided that Mr. Spangenberg's motion should be expanded to include the same changes in line 4 on page 157. The motion was put to a question and carried. It was then moved to approve Rule 5-04 as amended. This, too, was carried.

[The meeting adjourned at 5:00 p.m. until 9:05 a.m. August 10, 1968.]

Rule 5-05. Husband-wife privilege.

Professor Cleary stated this rule was as approved in the second draft. He further stated subdivision (3) of subsection (b) Exceptions was inconsistent with the Congressional position. He wanted to add to this a subsection dealing with the Mann Act provision. Professor Cleary then stated he felt subdivision (3) should be accepted and broadened. Dean Joiner moved to support the reporter. Mr. Jenner was against having a reference to the Mann Act in the rules. Judge Van Pelt restated Dean Joiner's motion: the reporter be authorized to add to subdivision (3) of subsection (b) language to include the Mann Act in accordance with his [the reporter's] recommendation. Judge Weinstein wanted to strike subdivision (3) altogether. It was then suggested that a vote be taken on Dean Joiner's motion. Mr. Spangenberg spoke against the motion. He stated he saw very little difference in sex crimes, machine gun crimes, etc., The vote was 7 for and 5 against. Mr. Williams moved to strike subdivision (3). Judge Estes spoke against Mr. Williams' motion. Mr. Williams had stated he did not think it right for a wife to be barred from testifying against her husband in some criminal cases, but definitely not in a Mann Act case. Mr. Jenner put Mr. Williams' motion to a vote. The vote was 4 for and 7 against. It was moved to approve Rule 5-05 was reported on page 166 with the exception of subdivision (3) which was to include the Mann Act problem. The motion was carried. Professor Cleary stated "Title 18 U.S.C. in line 14 should appear as "8 U.S.C.".

Rule 5-06. Communications to clergymen.

Professor Cleary stated this rule was as approved in the second draft. Mr. Epton moved approval as drafted. The motion was carried by a vote of 7 for and 3 against.

Rule 5-07. Political vote.

Professor Cleary stated this rule had never been changed since the first drafting. It was moved Rule 5-07 be approved as drafted. Mr. Haywood asked if this rule would cover the primaries. Professor Cleary said yes. Mr. Epton againsmoved for approval. It was carried.

Rule 5-08. Trade secrets.

Professor Cleary stated this rule was as approved in the second draft. He then brought up Rule 30(b) of the Federal Rules of Civil Procedure as presented on page 183. Dean Joiner stated he felt this Rule was not needed. Professor Cleary stated he felt the question was whether the language "trade secrets" should be retained. He further stated that "trade secret" was a simple phrase, "trade secret or other confidential research, development, or commercial information" could be the alternative. Judge Van Pelt stated he was interested in Professor Moore's observation. Professor Moore had stated he felt that if theso matters were not treated as privileged, anyone seeking to have them divulged either at discovery or at trial should have to show some real reason why they should be divulged in that there would be more harm from a failure to divulge than if dibulged, instead of putting it on a privilege basis.

Judge Estes was in favor of Rule 5-08 as drafted by the reporter. Mr. Berger was "not happy" with the rule, but was definitely not satisfied with the Note. Mr. Epton then moved approval of Rule 5-08. It was carried. Mr. Berger suggested the deletion of the first sentence of the second paragraph on page 181 of the Note. Mr. Spangenberg said he would like to have a "privilege rule" drafted with what would be a narrower view of a "trade secret". There was then a motion with respect to Mr. Berger's suggestion of striking the first sentence in the second paragraph of the Note. The motion was carried.

Rule 5-09. Secret of state.

Mr. Selvin questioned "the opposite party" in line 15 on page 186. He suggested "any other non-Government party". Professor Cleary suggested "another" replace "opposite" in line 15. This was acceptable with Mr. Selvin. Mr. Jenner suggested adding "for dismissing the action" on page 187. Mr. Spangenberg put Mr. Jenner's suggestion in the form of a motion. Mr. Spangenberg also included in his motion the striking of the word "or" in line 2 on page 187. The motion was carried.

Judge Weinstein then suggested making subsection (e) Effect of sustaining claim be as general as possible by changing "another" in line 15 to "a". Professor Cleary said it would be misleadingly broad if that were done. Judge Weinstein went

on to move "in a proceeding to which the government is a party" in lines 13 and 14 on page 186 be stricken and in line 15 replace "another" before "party" with "a", in line 3 on page 187, change "the government" to "a party". The motion was defeated.

Mr. Jenner then asked for an overall approval of Rule 5-09 as amended: Page 186, line 15 substitute "another" for "opposite"; page 187, line 2 include "for dismissing the action" after "a mistrial,". The motion was carried.

Rule 5-10. Identity of informer.

Professor Cleary asked if the committee might want to broaden subsection (c)(3) to include all issues of probable cause for the issuance of a warrant, or a search without a warrant, or arrest without a warrant. Mr. Williams questioned the second sentence of subsection (c)(3) which appeared on page 194. He felt "issuance of a warrant" did not help the criteria of the judge in making his decision. Judge Sobeloff moved that the sentence questioned by Mr. Williams be stricken. The motion was carried. Mr. Jenner then made a suggestion: in line 2 on page 194, substitute "he" for "the judge", also, in line 7, substitute "any" for "such" and strike "as" and insert "which". Mr. Epton suggested adding "or the security of the informer" in line 7 on page 194 after "other order which justice". He then stated his suggestion in the form of a motion. It was lost. Mr. Epton then moved the rule be approved as amended. The motion was carried.

Rule 5-11. Waiver of privilege by voluntary disclosure.

Mr. Jenner suggested "worthwhile" be inserted in line 4 on page 199 after the word "precedessor". There was a motion to approve this rule with Mr. Jenner's suggestion. It was carried.

Rule 5-12. Privileged matter disclosed under compulsion or without opportunity to claim privilege.

Mr. Berger moved approval of this rule as drafted. The motion was carried.

Rule 5-13. Comment upon or inference from exercise of privilege; instruction.

Some hypothetical cases were given against this rule. Professor Moore felt there should be a distinct difference between criminal and civil cases. Mr. Spangenberg said he felt the rule was "exactly right". He moved its approval as drafted. Dean Joiner moved that the reporter be instructed to recast this rule [(a)] so as to provide for appropriate comment by counsel and instruction by the court in civil cases where the evidence is excluded by the exercise of the privilege. [(a) and (c) were to be limited to criminal cases.] The motion to limit subsections (a) and (c) to criminal cases was lost.

Mr. Epton moved Rule 5-13 be approved. The motion was carried.

Article IV. Witnesses.

Rule 6-01. General rule of competency.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-02. Lack of personal knowledge.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-03. Oath or affirmation.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-04. Interpreters.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-05. Competency of judge as witness.

Dean Joiner felt this rule was inappropriate. He stated there should not be a hard and fast rule of exclusion of a judge testifying. Mr. Spangenbert stated "counsel can waiver". Mr. Epton moved approval of this rule ws drafted. The motion was carried.

Rule 6-06. Competency of juror as witness.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-07. Who may impeach.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-08. Evidence of character and conduct of witness.

Professor Cleary stated Rules 6-08, 6-09, and 6-10 were rearranged as to sequence. He further stated Dean Mason Ladd, among others, were against subsection (b) dealing with the reputation of witnesses. He said that the striking of subsection (b would enhance some changed in subsection (a) Opinion evidence of character also. Mr. Berger moved the striking of subsection (b) Reputation evidence of character, which would entail minor changes in subsection (a). The motion was lost. There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-09. Impeachment by evidence of conviction of crime.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-10. Religious beliefs or opinions.

Professor Cleary stated the caption was changed. Mr. Epton suggested changing "virtue" in line 4 to "reason". Dean Joiner put Mr. Epton's suggestion into the form of a motion. It was carried. It was then moved this rule be approved as amended. The motion was carried.

Rule 6-11. Mode and order of interrogation and presentation.

Professor Cleary suggested "Except as to a party or a person identified with a party" be inserted after (b) Scope of cross-examination in line 10. Judge Weinstein was against this suggestion. He felt it would be more restrictive to parties. Professor Cleary's suggestion was put to a vote. It was defeated by a vote of 5 for and 7 against. Judge Weinstein stated subsection (b) as drafted put it [decisions]

in the discretion of the judge. This would seem to indicate that the scope of the waiver depends upon how the judge exercises his discretion. Further, he felt, someplace in the rule a statement was needed to show the Committee did not intend to affect the scope of the waiver problem in a self-incrimination case. Mr. Spangenberg said on page 252 [in the Note] a statement was included.in this respect. Judge Weinstein then moved this rule be approved. Professor Cleary then suggested adding "but only" in line 14 following "additional matters". Mr. Berger moved approval of this rule as amended. The motion was carried. Dean Joiner then asked if this rule could be voted on separately by subsections. Subsection (a) Control by judge was approved as drafted by the reporter. Subsection (b) Scope of cross-examination was approved with the insertion of the words "but only" following "additional matters" in line 14. Subsection (c) Leading questions was approved as drafted by the reporter. Rule 6-12. Writing used to refresh memory. Professor Cleary stated Section 3500 of Title 18 United States Code had been inserted. Mr. Jenner asked where in the drafted rule the new language began. Professor Cleary answered beginning line 8 on page 256 and all of page 257. Mr. Jenner asked if there were any comments or suggestions with regard to the new section. Dean Joiner suggested underscoring "in camera," in line 10 and inserting a comma in line 2 of page 257 after "not to comply".

There was a motion to approve this rule with the suggestions of Dean Joiner. The motion was carried.

Rule C-13. Prior statements of witnesses.

Professor Cleary stated this rule is as was approved in the second drafting, except for the last sentence. The reason for adding the last sentence was that "non-party" was too narrow. He further stated there could be admissions made by people who are not parties. The reporter wanted to prevent this rule from applying to prior statements admissible in evidence as an admission by a party. Mr. Epton moved this rule be approved as drafted. The motion was carried.

Rule 6-14. Calling and interrogation of witnesses by judge.

There was a motion to approve this rule as drafted. The motion was carried.

Rule 6-15. Exclusion and sequestration of witnesses.

Mr. Epton moved this rule be approved as drafted. The motion was carried.

Mr. Jenner was not able to attend the first day of the August meeting. He questioned the reporter on Rule 1-04. He wanted to know why on page 12 line 5 was limited to "actions tried without a jury". The reporter answered this was as of present Rule 43. Professor Cleary further clarified: "To get the evidence completely in the record so that in the event of a reversal of the lower court's ruling excluding it, there

is a chance, at least, that the reviewing court will have before it a complete record with the final disposition of the case." Mr. Jenner felt "actions tried without a jury" was inconsistent with subsection (c) Presence of jury. The reporter said "If you have a jury case and evidence is excluded which should have been admitted, the reviewing court can't consider that evidence and then arrive at a different result which they can do in a chancery or non-jury case."

Mr. Jenner then questioned Rule 1-06. In line 7 "In his determination" he felt there should be a verb inserted. It was unanimously carried "making" would be inserted. The sentence to read: "In making his determination . . ."

Discussion ensued as to when the next Evidence Meeting would be held. The dates decided upon were December 10, 11, 12, 13, and 14, 1968 [Tuesday through Saturday].

[The meeting adjourned
at 2:00 p.m.]