D-R-A-F-T

MINUTES OF
THE ADVISORY COMMITTEE ON RULES OF EVIDENCE
MEETING OF DECEMBER 14 & 15, 1967

The twelfth meeting of the Advisory Committee on Rules of Evidence was convened in the ground floor conference room of the Supreme Court Building on Thursday, December 14, 1967, at 9:00 a.m., and was adjourned on Friday, December 15, 1967, at 5:00 p.m. The following members were present:

David Berger
Hicks Epton
Robert S. Erdahl
Joe Ewing Estes
Thomas F. Green, Jr.
Egbert L. Haywood
Charles W. Joiner
Frank G. Raichle
Herman F. Selvin
Simon E. Sobeloff
Craig Spangenberg
Robert Van Pelt
Jack B. Weinstein
Edward B. Williams
Edward W. Cleary, Reporter

Albert E. Jonner, Jr., Esquire, Chairman, was unable to attend because of illness. Others present at the meeting were Professors James Wm. Moore and Charles A. Wright, members of the standing Committee, and Mr. Joseph F. Spaniol, Jr., Chief of Procedural Studies and Statistics Division of the Administrative Office of the United States Courts.

In the absence of the regular chairman, Judge Van Pelt presided.

Agenda Item No. 1 - [illegible] No. 19

Rule 8-01(c)(4). Admission by party-opponent.

Professor Cleary gave the background for Rule 8-01(c)(4) as proposed in the first draft on page 43 of Memorandum No. 19. He suggested changing the word "as" in line 19 to read "When offered". It was decided, with regard to grammar and style, to leave the suggested language to the reporter. With respect to category (i), Professor Cleary read his comment set forth on pages 91 and 92 of Memorandum No. 19.

Dean Joiner said he thought that this section was designed to cover inadmissible statements made by an individual person in his capacity as a representative. He said that by the manner in which Professor Cleary was explaining the language, it seemed to mean that a statement of a representative of a party is inadmissible against the party represented. There was confusion as to just what the proposed language did mean. Professor Cleary said that his purpose was simply to have language to provide that when a person, in a representative capacity, makes a statement, there need be no further inquiry as to whether he made it as a representative or as an individual, because the statement, if relevant, is admissible against the person in either capacity. Dean Joiner agreed that that was what the proposed rule provided. However, the reporter thought that

category (i) should be redrafted to make the language clearer.

Judge Van Pelt read the material relating to category (ii) from pages 92-94 of Memorandum No. 19. Mr. Williams asked the reporter if the difference in categories (ii) and (iv) was that where (ii) is applicable, the declarant must have specific authority from his principal to speak at that time on the subject before his statement is made. Professor Cleary replied that it was his intention that the statements be in the concept of authority given by the principal to the party making the statements.

Mr. Berger felt that category (ii) was covered by category (iv). Professor Cleary said he thought that may be so, but just to make sure that category (iv) is broad enough to encompass category (ii), the reporter was to take another look at both categories and submit new language.

Judge Van Pelt read category (iii) of Rule 8-01(c)(4), as proposed in the first draft on page 43 of Memorandum No. 19, and the reporters comment on pp. 94-96 of that same memorandum. Professor Cleary said that in connection with the criminal situation, the language gets into constitutional areas.

There was a very lengthy discussion on the fact of whether or not silence means admission. Dean Joiner moved that category (iii) be approved, and Judge Estes seconded the motion.

Mr. Spangenberg said that, as a matter of policy, he would be happy to see admissions treated as an exception to the hearsay rule. Following further discussion, Professor Cleary suggested that the matter be bypassed until the Committee reached the subject matter of Rule 8-03. Professor Wright said that he hoped that a note to Rule 8-01(c)(4) would state that sometimes silence is admission and sometimes it is not. Judge Sobeloff proposed that the motion for approval of category (iii) be amended to include approval with the understanding that there would be a note to include the suggestions of Professors Green and Wright. Professor Cleary stated that the note would explain that this rule is not intended as a deviation from the general pattern of existing law, and that under appropriate circumstances it is possible for a party to manifest his acquiescence in a statement by failing to deny it or dispute it, when an ordinary reasonable person would be expected to deny it or to dispute it if it were not true. It would also say that this is an obviously limited applicability in criminal cases to the constitutional development, and that under certain circumstances there is the broad rule that silence is consent.

[At this point, Professor Cleary asked the Committee to be considering what should go into the Advisory Committee's Notes to the rules at time of publication. He suggested that they take a look at the California comments in their final form as a guide. The matter was to be discussed at a future meeting.]

A vote was taken on the motion to approve category (iii) with the understanding that there would be an accompanying note. The motion was carried unanimously.

Judge Van Pelt read category (iv), as proposed in the reporter's first draft on page 43 of Memorandum No. 19, and the reporter's comment on pp. 96-98 of that same memorandum. Professor Cleary said that, in light of points raised in an earlier discussion, there was a possibility that categories (ii) and (iv) could be combined. Mr. Epton asked if category (iv) covered an independent contractor. There was a general discussion concerning statements made by employees while in the employment of agencies and statements made by employees, who had been dismissed.

Dean Joiner moved that category (iv) be approved as drafted. Judge Sobeloff seconded the motion.

Mr. Epton offered, as an amendment to Dean Joiner's motion, that the words "or employment" in line 26 be stricken. Mr. Berger suggested that the language be: "within the scope of the principal agent, master-servant relationship". Judge Estes suggested that the word "an" in line 26 be deleted. Mr. Spangenberg suggested that, in lieu of the word "declarant" in line 26, the words "an agent or servant" be used. Professor Cleary suggested that in line 25, after the word "statement" the following be inserted: "by a servant or agent", and in line 26, the word "his" be used in lieu of "an" and the words "of the declarant" be stricken. Dean Joiner felt that the words "by an agent or

servant for the party" should be inserted after the word "statement" rather than have "for the party" in line 26. There was no objection to that. Mr. Epton accepted the amendment to his motion so that it was then that the following language be used for category (iv): "a statement by an agent or servant for the party concerning a matter within the scope of his agency or employment made before the termination of the relationship". The motion was carried by a vote of 9 to 3.

A vote was then taken on Dean Joiner's motion to approve as amended. The motion was carried by majority approval.

Judge Van Pelt read category (v), as proposed in the first draft on page 43 of Memorandum No. 19, and the reporter's comment on pp. 98-100 of that same memorandum.

There was a general discussion concerning cases of conspiracy. However, Professor Cleary pointed out that the basic principle formulated in category (v) is that in a conspiracy prosecution a pertinent statement by a co-conspirator is admissible. He said the whole tenor of the discussion just held was the problem of the preliminary determination of admissibility, and that that did not really concern the proposed language for category (v). Mr. Erdahl moved approval of category (v) as drafted by the reporter. Dean Joiner seconded the motion, and it was carried by majority approval.

Judge Van Pelt read category (vi) as proposed in the first draft on page 43 of Memorandum No. 19, and the reporter's comment on pp. 101-103 of that memorandum. Mr. Epton moved that category (vi) be stricken, and Mr. Raichle seconded the motion. Mr. Spangenberg moved that the subject matter be tabled until the Committee had discussed what was going to be done with admissions against interest. Dean Joiner seconded the motion. Mr. Epton withdrew his earlier motion, and Mr. Raichle withdrew his second thereto. Mr. Spangenberg's motion was carried unanimously.

Judge Van Pelt read subsection (d), as proposed in the first draft on pp. 43-44 of Memorandum No. 19, and the reporter's comment on pp. 103-108 of that memorandum.

Professor Cleary stated that there were two issues before the Committee: 1) whether when the declarant claims a privilege it ought to be regarded as making him unavailable and 2) whether the provision in connection with use of depositions is a satisfactory aspect of unavailability for civil cases. He thought perhaps the Committee would prefer that the questions be tabled until it had had a chance to explore the ramifications of the situation and to see what really is involved. Mr. Berger moved that the subject matter be tabled. Mr. Spangenberg asked the reporter to consider putting into provision (3) the words "on the matter" after the word "testify". Mr. Spangenberg then seconded Mr. Berger's motion. Professor Moore thought that perhaps in civil cases unavailability should be geared to subpoenas. After a brief discussion, a vote was taken on Mr. Berger's motion.

and there was unanimous approval.

EVIDENCE RULE 8-02. HEARSAY RULE.

Judge Van Pelt read Rule 8-02 as proposed in the first draft on page 109 of Memorandum No. 19. Mr. Spangenberg moved its approval. Mr. Raichle seconded the motion, and it was carried unanimously. As approved, Rule 8-02 reads: "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."

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

Judge Van Pelt read Rule 8-03 as proposed in the first draft on page 113 of Memorandum No. 19.

(a) General Provisions.

Mr. Spangenberg suggested that the language begin with the words "Notwithstanding that the witness is available", and Professor Cleary had no objection to that approach. Mr. Haywood suggested that the language read: "Evidence is not to be excluded under the hearsay rule if, ..." Mr. Spangenberg moved the adoption of Mr. Haywood's suggested wording. Mr. Berger seconded the motion, and there was unanimous approval.

Dean Joiner felt that the language should provide for the situation where the declarant is not available as a witness, and that the test applied should be the broader one - that the special circumstances under which the statement was made offer some reasonable assurances of accuracy.

Mr. Spangenberg said he thought that the rule should be phrased in terms of assurances that there was no motive or incentive to falsify.

Professor Cleary said that he felt that there had to be something more impressive than absence of a motive to falsify in order to justify not requiring the declarant's testimony, even though he is available.

Dean Joiner suggested that the Committee move forward to a discussion on the exceptions to the hearsay rule and then come back to the idea of either placing a preamble to the exceptions or adopting a broad rule for the development of the law and try to find at that point what the statement of the rule should be. He suggested that the discussion on subsection (a) of Rule 8-03 be tabled. This was agreeable to all.

(b)(1) Present sense impression.

Mr. Haywood felt that the words "immediately thereafter" would be open to vastly different interpretations. Following a short discussion, during which hypothetical cases were presented, Mr. Berger moved that Rule 8-03(b)(1) be stricken.

Further discussion, in which examples of possible res gestae situations were given, was held. Judge Estes suggested that the words "this statement is made and recorded immediately thereafter" be used in subparagraph (1). Mr. Berger again stated that he would move to strike subparagraph (1) as

drafted, because he said it would allow hearsay evidence of an event - despite the fact that that eye witness is available. Mr. Spangenberg seconded the motion. During the ensuing discussion, Professor Cleary said it seemed to him that the whole thrust of the subject matter ought to be in the direction of not closing the door on what is thought to be acceptable evidence.

Mr. Erdahl said he was still puzzled about the meaning of the word "immediately" used in line 16 of Rule 8-03(b)(1). Professor Cleary said that the word may not be essential. Mr. Haywood felt that the very essence of "Present sense" was lost when the area of "immediately thereafter" was entered. A vote was taken on Mr. Berger's motion to strike Rule 8-03(b)(1). The result was a tie vote of 6.

Mr. Spangenberg then moved that Rule 8-03(b)(1) be approved as drafted by the reporter. Mr. Berger seconded the motion, and it was carried by a vote of 7 to 6. As approved, Rule 8-03(b)(1) reads:

> "(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."

Mr. Spangenberg moved approval of Rule 8-03(b)(2). The motion was carried unanimously, and as approved Rule 8-03(b)(2) reads as follows:

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

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

Judge Van Pelt read Rule 8-03(b)(3) as proposed by the reporter's first draft on page 135 of Memorandum No. 10.

Mr. Spangenberg saw no need for the last clause "but not including memory or belief to prove the fact remembered or believed." Professor Cleary related some of the facts surrounding the Hillmon case. Dean Joiner moved approval of Rule 8-03(b)(3). Mr. Epton asked the reporter to what time the word "then" in line 10 referred. Professor Cleary stated that it meant the time at which the statement was made. Certain aspects of the Sheppard case were mentioned.

Mr. Epton suggested that the words "condition or state of mind" be used in lieu of the words "mental, emotional, or physical condition" in lines 10 and 11. Professor Cleary proposed "then existing state of mind, emotion, or physical condition or sensation". Dean Joiner accepted that wording. Professor Green suggested that the word "sensation" be moved so that it would precede "or physical condition". Dean Joiner accepted the change suggested by Professor Green. Dean Joiner's motion was carried unanimously, and as approved Rule 8-03(b)(3) reads:

"(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."

Judge Van Pelt read Rule 8-03(b)(4) as proposed in the reporter's first draft on page 143 of Memorandum No. 19. Professor Cleary stated that he wished to make the following changes in his draft: in line 11, the word "previous" should be stricken, and in line 12, before the word "symptoms", the words "or past or present" should be inserted. Mr. Spangenberg moved approval of Rule 8-03(b)(4) as presented by the reporter, and Mr. Raichle seconded the motion.

Mr. Epton moved that the words "cause, or internal source" in line 12 be deleted. Professor Cleary said he felt that the cause of the injury, aside from questions of fault, is quite relevant in many cases for purposes of diagnoses. Judge Sobeloff asked what was meant by "internal source". Mr. Epton changed his motion to one that the words "cause or internal source" in line 13 be changed to "general character of the cause or external source thereof". Judge Sobeloff seconded the motion, and it was carried unanimously. As unanimously favored and adopted, Rule 8-03(b)(4) reads:

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

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

(5) Records of regularly conducted activity.

Judge Van Pelt read Rule 8-03(b)(5) as proposed by the reporter in his first draft on page 149 of Memorandum No. 19. Professor Cleary gave the background of the proposed material.

Mr. Haywood was against the use of the word "opinions", as he felt that it was too broad. After a short discussion, Mr. Epton moved that the words "or opinions" be stricken from line 10. Mr. Haywood seconded the motion. There was a general discussion concerning different cases and opinions given in different situations. Mr. Berger suggested the addition of the words "Except where prepared for purposes of litigation" at the beginning of line 9. Professor Cleary said he felt that the deletion of the words "or opinions" would be harmful in the federal cases which begin with the Taylor v. New York Life case in the District of Columbia. Judge Estes said that the reporter could use "diagnosis".

Professor Green suggested that perhaps, rather than "diagnosis", "expert's opinions" could be used. Mr. Epton did not accept the amendment.

Mr. Epton's motion was lost by a vote of 6 to 4.

Mr. Spangenberg moved that "or diagnosis" be substituted

for the words "or opinions" in line 10. Mr. Epton seconded the motion, and it was carried by a vote of 8 to 4.

Dean Joiner moved for approval of provision (5), and the motion was carried unanimously. As approved, Rule 8-03(b)(5) reads:

> "(5) Records of regularly conducted activity. Memoranda, reports, or records of acts, events, conditions, 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." [Later action on this.]

[Meeting was adjourned on Thursday at 5:28 p.m. and was resumed on Friday at 9:07 a.m.]

Rule 8-03(b)(6) Absence of entry in records of regularly conducted activity.

Judge Van Pelt read rule 8-03(b)(6) as proposed in the reporter's first draft on page 178 of Memorandum No. 19.

Since there seemed to be some confusion as to the grammar used for lines 13 through 16, Professor Cleary proposed the following substitute language: "of the matter, if the matter was of a kind of which a memorandum, record, or report conforming to example (5) above is ordinarily made and preserved." Judge Estes moved adoption of subparagraph (6) as submitted and amended by the reporter. There was unanimous approval. As approved, Rule 8-03(b)(6) reads as follows:

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

Evidence that a matter is not mentioned in the memoranda, reports, or records 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, record, or report conforming to example (5) above is ordinarily made and preserved."

Rule 8-03(b)(7) Public records and reports.

Judge Van Pelt read Rule 8-03(b)(7) as proposed by the reporter in his first draft on page 180 of Memorandum No. 19.

Professor Cleary gave the substance of his comment thereto. Mr. Williams moved to reconsider subparagraph (5). It was agreeable to all to do so.

Rule 8-03(b)(5) Records of regularly conducted activity.

Mr. Williams said as he understood it an investigator's report by an F.B.I. agent would qualify under the rule. Professor Cleary said that such a report would not qualify under this rule, because although the F.B.I. agent was considered to be a part of the activity, the witnesses interviewed by him were not. Mr. Berger suggested that subparagraph (5) begin with the with words "Except when prepared for purposes of litigation". Mr. Epton suggested that the "unless" clause beginning on line 15 be changed to read: "unless the record is prepared for the purpose of actual or potential litigation or the source of the information or the method or circumstances of preparation indicate lack of trustworthiness."

There was an extensive discussion during which different aspects of many cases were presented - in the main - showing

that records had been kept by certain companies for purposes of litigation.

Mr. Spangenberg read § 1732 of Title 28 U.S.C.

Judge Estes asked if the reporter had any objection to the deletion of the word "reports" from line 9. Mr. Williams felt that the shop-book rule was much narrower than proposed subparagraph (5), in so far as the shop-book rule only says that "any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum . . ..".

Mr. Spangenberg said that he did not read subparagraph (5) as including F.B.I. reports, and that perhaps it could be made clearer in the rule that "regularly conducted activity" was not meant to include the activities of various federal criminal enforcement agencies.

Mr. Selvin thought that perhaps the emphasis should be put on the purpose for which the record was made. He said that subparagraph (5) put the emphasis on the end result of the memoranda and report, regardless of the purposes for which they were made.

Dean Joiner moved that the language read: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum, report, or record of acts, events, conditions, or diagnoses, 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."

The motion was carried unanimously, and Rule 8-03(b)(5) as approved reads as set out in the aforementioned motion.

Rule 8-03(b)(7) Public records and reports.

There was no comment on (a).

With respect to (b), Mr. Berger asked if the prosecution could put the report, of an officer who observed an accident, into evidence in a traffic court case at which the officer was not present. Professor Cleary replied that records, which incorporate that which had been observed personally by the officer, are admissible; records which reflect what the officer had learned from others are not.

Mr. Selvin suggested that a rule be framed to take care of unimpeachable matters first.

Professor Cleary read material on pages 189 and 190 with respect to federal statutes which disclose provisions for admitting a variety of evaluative reports.

Following further discussion, Professor Cleary said he thought that the confrontation problem should be discussed and decided. He said it seemed to him that the pattern which evolved is one which has been described as prosecutorial behavior.

He said that if the Committee tried to make a set of hearsay rules which would perform the work of the Sixth Amendment confrontation provision, it would be a mistake. He said that the concern should be with the hearsay rule as a rule of exclusion and that the assumption should not be made that because certain hearsay evidence is admissible under the rules formed by the Committee that the confrontation provision is necessarily satisfied. He thought the Committee should think of confrontation as setting up another standard that has to be complied with in criminal cases, and he said that the Committee did not really know just what that standard was at the time.

Mr. Berger suggested that language for subparagraph (7) be: "Written statements or records of public agencies reflecting acts, transactions, or occurrences within the scope of the jurisdiction of such public agencies."

[A discussion was held on the date to be set for the next meeting. It was agreed that it would be held on March 7, 8, and 9, 1968 (Thursday, Friday and Saturday). Also, a tentative meeting date was set for May 23, 24, and 25, 1968 (Thursday, Friday, and Saturday).]

Mr. Selvin suggested that something along the following lines be used in lieu of (a) and (b) of subparagraph (7): "Written records of public officials or agencies, made in the regular course of their official duties, of commercial, scientific, or demographic data required by law to be collected or kept by them".

Mr. Berger asked if "findings or conclusions" in line 14 meant findings of facts as distinct from opinions or conclusions. Following a very lengthy discussion, Mr. Berger asked if the word "factual" added before "findings" in line 14 might be more acceptable, and if, as a matter of policy, the Committee should limit subparagraph (c) to factual findings.

During the discussion which ensued, Dean Joiner said that in Rule 64 of the Uniform Rules of Evidence the official record must be tendered to the other side in advance of the trial prior to the time of offering it in evidence for the purpose of investigating it. He asked if the Committee was going to deal with that question.

Professor Cleary said that on the question raised by Dean Joiner, he had not included a provision such as Uniform Rule 64 and did not propose to include it, unless the Committee felt otherwise. He said that it never had been the law that notice had to be given in advance of any intention to offer a public record. His own feeling was that it was very difficult to justify any notice provision in this area - particularly in the case of a public record.

Judge Weinstein would take the proposed rule without any notice requirement at all, but he said it seemed to him that if the Committee were going to reject it that a better way would be to require judicial notice.

Mr. Berger moved to amend line 14 by deleting "or conclusions" and adding the word "factual" before "findings". The motion was carried by a majority vote. There was one dissenter.

Dean Joiner moved adoption of subparagraph (7) as amended. Judge Estes seconded the motion. Since there were still questions with regard to (a) and (b), Dean Joiner withdrew his motion. Mr. Berger moved adoption of (c) as amended. The motion was carried by a vote of 8 to 4, and Rule 8-03(b)(7)(c) reads as follows:

> "(c) 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."

Mr. Selvin moved adoption of his language suggested for (a) and (b) in lieu of the language proposed by the reporter. Mr. Spangenberg seconded the motion. Professor Cleary read Mr. Selvin's suggested language as follows: "Written records of public officials or agencies, made in the regular course of their official duties, of commercial, scientific, or demographic data required by law to be collected or kept by them". There was a tie vote of 7 on Mr. Selvin's motion.

Mr. Spangenberg moved that the following sentence be added to subparagraph (7): "This example does not exclude from the hearsay rule those records or reports made with the dominant purpose of criminal prosecution." Mr. Spangenberg's motion was carried by a majority vote.

Dean Joiner moved adoption of subparagraph (7) as amended. The motion was lost by a vote of 6 to 5.

It was decided to leave the subject matter to the reporter for further study and drafting of a rule, which might possibly contain solutions to the problems raised during the morning session.

Rule 8-03(b)(8) Required reports.

Judge Van Pelt read Rule 8-03(b)(8) as proposed in the reporter's first draft on page 195 of Memorandum No. 19. Professor Cleary gave the substance of his comment to the proposed rule.

Professor Cleary said he thought the problem was to just how far the Committee wanted to go. One possible approach would be to say all reports required by law to be made under penalty of some kind. He said that there are certain positions at which you can stop short of that. The California people used "reports of vital statistics". During the discussion which followed, Dean Joiner said that the principle involved was trying to provide the trier of the fact with evidence which has some value. He said that this was provided principally through cross-examination. He felt that there was confusion created by the fact that some of the Committee members tended to equate the evidence in these reports with prima facie cases, etc., and that was not what was involved. It was admissibility of evidence. He thought that the Committee ought

to go broad in allowing evidence of this kind, when there was some reasonably strong guarantee in allowing the jury and the fact finders to deal with it fairly and allowing the lawyers to call the makers of the reports for examination and cross-examination, and to provide the machinery by which this procedure could be followed.

There was a general discussion as to the function of the Evidence Rules Committee.

Mr. Bergor asked if it was intended that tax returns would be included among the writings to be excluded from the application of the hearsay rule. Professor Cleary called attention to his comment on page 199 of Memorandum No. 19.

Mr. Spangenberg suggested that the following language be added to subparagraph (3): "If the record, report, or finding is not made confidential or inadmissible by the statute requiring the filing". Professor Wright felt that since in the proposed rule there were terms which were ambiguous to the Committee, they would be even more ambiguous to the country at large. Dean Joiner moved that the matter be deferred to the reporter.

Professor Cleary said that there was a very different policy involved between the Uniform Rule approach and the California approach, and that a third alternative would be to required reports by law with a penalty for a false report.

Mr. Berger moved that as a matter of policy subparagraph (8) be redrafted to conform with the Wigmore concept - that this particular exclusion to the hearsay rule should be limited to reports required by law to be filed by those engaged in licensed professions. Professor Cleary pointed out that the word "licensed" was not satisfactory, because clerks are not licensed. Mr. Berger changed his motion so that it was that lines 11 and 12 be amended as follows: strike the words "occupying a particular status or engaged in a particular occupation", and substitute "licensed or authorized by law to engage in a profession or to perform the matters reported".

Dean Joiner said he did not understand why subparagraph (8) should not be considered in connection with public records. He thought the reporter would want to take another look at subparagraph (8) at the same time that he reviewed subparagraph (7). Mr. Raichle suggested that, since the members were quite undecided as to the desired results of subparagraphs (7) and (8), they send their drafts to the reporter between this meeting and the next one as a guide to draftsmanship. Mr. Berger moved that the reporter be asked to redraft Rule 8-03(b)(8) to provide for exclusion from the hearsay rule a report filed by a professional person. There was a discussion concerning certain reports required to be filed by doctors.

Mr. Haywood moved that the substance of the California rule, which reads: "Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule, if the maker was required by law to file the writing at a designated public office and the writing was made and filed as required by law.", be adopted. After a short discussion, a vote was taken on Mr. Haywood's motion, and the motion was carried by a count of 9 to 4.

Rule 8-03(b)(9) Absence of public record or entry.

Judge Van Pelt read Rule 8-03(b)(9) as proposed in the reporter's first draft on page 200 of Memorandum No. 19.

Dean Joiner moved the adoption of said rule, and there was unanimous approval. As approved, Rule 8-03(b)(9) reads:

> "(9) Absence of public record or entry. To prove the absence of a record or report conforming to examples (7) or (8) above, or the non-occurrence or non-existence of a matter of which such a record or report was ordinarily made and preserved, evidence in the form of a certificate of the custodian or testimony that diligent search failed to disclose the record or report or entry therein."

Rule 8-03(b)(10) Records of religious organizations.

Judge Van Pelt read Rule 8-03(b)(10) as proposed in the reporter's first draft on page 203 of Memorandum No. 19.

Mr. Berger moved its adoption. Following a very short discussion centered around the meaning of "ancestry", the motion was approved unanimously. As approved, Rule 8-03(b)(10) reads:

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

Rule 8-03(b)(11) Marriage, baptismal, and similar certificates.

Judge Van Pelt read Rule 8-03(b)(11) as proposed in the reporter's first draft on pages 203 and 204 of Memorandum No. 19.

Judge Sobeloff moved its adoption, and there was unanimous approval. As approved, Rule 8-03(b)(11) reads:

> "(11) Marriage, baptismal, and similar certificates. Statements of fact of the kinds mentioned in example (10), contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter."

Rule 8-03(b)(12) Family records.

Judge Van Pelt read Rule 8-03(b)(12) as proposed in the reporter's first draft on page 204 of Memorandum No. 19. Judge Estes moved its adoption, and the motion was carried unanimously. As approved, Rule 8-03(b)(12) reads as follows:

"(12) Family records. Statements of fact of the kinds [illegible] (10), contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like."

Rule 8-03(b)(13) Records of documents affecting an interest in property.

Judge Van Pelt read Rule 8-03(b)(13) as proposed in the reporter's first draft on page 209 of Memorandum No. 10. Judge Sobeloff moved its adoption, and as unanimously approved Rule 8-03(b)(13) reads:

"(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."

Rule 8-03(b)(14) Statements in documents affecting an interest in property.

Judge Van Pelt read Rule 8-03(b)(14) as proposed in the reporter's first draft on page 210 of Memorandum No. 19. Judge Sobeloff moved its adoption.

Judge Weinstein asked if the language beginning with the word "and" in line 21 and running through line 24 was needed. There was a general discussion concerning wills. Judge Weinstein said the reason he was against the "and" clause contained in lines 21-24 was because it gives the power to the judge to rule on the question of evidence, at least in some cases, and to dispose of the litigation.

Mr. Upton moved that the language beginning with the word "and" in line 21 and running through line 24 be deleted. Judge Estes suggested that the reporter follow the lines of the Uniform Rule with respect to the language in lines 21-24. Following a short discussion, Judge Estes moved that subparagraph (14) read as follows: "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." The motion was carried by majority approval.

Dean Joiner moved that subparagraph (14) be ended with the word "document" in line 21. The motion was lost by majority opposition.

Judge Weinstein moved to strike the phrase "the truth of the statement or" in line 23. After a very brief discussion, the motion was lost by a count of 11 to 7.

Dean Joiner moved approval of subparagraph (14) as amended. The motion was carried unanimously, and as approved Rule 8-03(b)(14) reads:

> "(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 and unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purpose of the document."

[Dean Joiner wished the record to show that he is holding $6.00 for future use by the Committee. This amount was a carry over from a recent collection made by the members' contributions to the flower fund.]

Rule 8-03(b)(15) Statements in ancient documents.

Judge Van Pelt read Rule 8-03(b)(15) as proposed in the reporter's first draft on page 210 of Memorandum No. 19. Mr. Selvin moved that there be added to subparagraph (15) substantially the same language carried in the "unless" clause of subparagraph (14). Professor Cleary said that the "unless" clause in subparagraph (14) involves the status of the document as a title document and deprives it of its evidentiary power if it is proved that it is not a title document. He said that the clause would not do the same thing in subparagraph (15). Mr. Selvin's motion was defeated by majority opposition.

Mr. Epton moved adoption of subparagraph (15) and there was majority approval. As approved, Rule 8-03(b)(15) reads:

"(15) Statements in ancient documents. Statements in documents whose authenticity is established as ancient documents under Rule 9-02(b)."

Rule 8-03(b)(16) Market reports, commercial publications.

Judge Van Pelt read Rule 8-03(b)(16) as proposed in the reporter's first draft on page 215 of Memorandum No. 19.

Mr. Fulchle moved its adoption. There was unanimous approval to have Rule 8-03(b)(16) read:

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

Rule 8-03(b)(17) Learned treatises.

Judge Van Pelt read Rule 8-03(b)(17) as proposed in the reporter's first draft on pages 215 and 216 of Memorandum No. 19. There was a general discussion centered around materials written concerning specific professional fields.

Mr. Haywood moved that subparagraph (17) be deleted. Mr. Berger seconded the motion, and it was carried by a count of 8 to 5.

Judge Weinstein asked if the Committee would consider taking an intermediate position in the situation where an expert says he relies on a portion of the treatise and refuses to impeach his credibility. Judge Weinstein would permit that portion of the treatise relied upon to be presented to the jury.

Following a very short discussion, Judge Weinstein moved that as a matter of policy the reporter be requested to present a draft of the proposed rule for taking the intermediate position as suggested. The motion was carried by majority approval.

Rule 8-03(b)(18) Reputation concerning personal or family history.

Judge Van Pelt read Rule 8-03(b)(18) as proposed by the reporter in his final draft on page 221 of Memorandum No. 19.

Judge Sabaloff moved its adoption. The motion was carried unanimously and as approved, Rule 8-03(b)(18) reads:

> "(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."

Rule 8-03(b)(19) Reputation concerning boundaries or general history.

Judge Van Pelt read Rule 8-03(b)(19) as proposed in the reporter's final draft on pages 221 and 222 of Memorandum No. 19. Mr. Berger moved its adoption. The motion was carried unanimously, and Rule 8-03(b)(19) reads:

> "(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."

Rule 8-03(b)(20) Reputation as to character.

Judge Van Pelt read Rule 8-03(b)(20) as proposed in the reporter's final draft on page 222 of Memorandum No. 19. Professor Cleary explained the background. Judge Estes moved adoption of the rule, and there was unanimous approval. As approved, Rule 8-03(b)(20) reads:

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

[The meeting was adjourned at 5:00 p.m.]