D R A F T

MINUTES OF
THE ADVISORY COMMITTEE ON RULES OF EVIDENCE
MEETING OF MAY 18, 19, and 20, 1967

The ninth meeting of the Advisory Committee on Rules of Evidence was convened in the ground floor conference room of the Supreme Court Building on Thursday, May 18, 1967, at 9:05 a.m. and was adjourned on Saturday, May 20, 1967, at 1:00 p.m. The following members were present:

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

Professors James Wm. Moore and Charles A. Wright, members of the standing Committee, were in attendance also.

Mr. Jenner welcomed all members and congratulated Jack Weinstein on his new judgeship.

PROPOSED RULE OF EVIDENCE 6-06. COMPETENCY OF JUROR AS WITNESS.

(b) Inquiry into validity of verdict or indictment.

Professor Cleary read the proposed rule and his comment thereto. He pointed out that the word "of" appearing before "a juror" in line 7 should be stricken. Mr. Williams said he always thought that the jurors were permitted to testify concerning extrinsic effects. After a short discussion, Dean Joiner moved that the rule be approved. Judge Estes seconded.

It was felt that additional language was necessary in the text of this rule to show that it was a change from previous law. Because of this discussion, Dean Joiner withdrew his motion for approval. Mr. Epton offered a change in the language so that it would read: "Upon an inquiry into the validity of a verdict or indictment a juror may testify concerning conditions or the occurrence of events calculated to exert an improper influence on the verdict but may not testify concerning the effect of anything . . .." Professor Cleary suggested using the words "or otherwise a juror is competent to testify upon an inquiry into the validity of the verdict or indictment." Mr. Spangenberg said that he was in favor of putting into a comment two things: first, that the Committee was treating this as competency rather than admissibility, and, second, other evidence is admissible evidence and the juror may so testify. He moved that consideration as to when the juror may testify be spelled out in a comment rather than being written in

the rule. Judge Estes seconded. Motion was carried unanimously.

Dean Joiner moved approval of the rule. Judge Estes seconded.

Professor Moore asked if a juror should be competent to testify as to the effect on the emotions of another juror. Dean Joiner felt that there should not be a rule that would prohibit testimony as to observable facts. Mr. Williams asked if it were the intention of the reporter, in drafting the rule, to permit jurors to testify with respect to their colleagues' feelings and emotions as reflected by either their countenances or words. After a short discussion, Professor Cleary said he felt that the last line could be changed to read: "Nor may his affidavit or evidence of any statement by him be received for these purposes." Mr. Williams did not feel that the change met the problem, which was whether or not what was said by a juror during the deliberations in the jury room before verdict could be put in. He felt that anyone reading the proposed language would feel that subject matter referred to material filed after verdict. After a rather lengthy discussion, Professor Cleary stated that it seemed to him that the Committee ought to narrow its consideration to the question of/one concerning any particular incompetence of a juror in this area and that involvement in the question of grounds for setting aside the verdict and granting a new trial should be avoided. Dean Joiner withdrew his motion to approve the rule.

Mr. Epton moved that the words "or any other juror's" be added at the end of line 8. After discussion, the motion was carried by a majority vote.

Judge Sobeloff moved that in line 8 the words "testify as to any relevant objective fact but" after the word "may" be added and then the rest of the text be picked up with the elimination of "testify" in line 8. After a short discussion, vote was taken and motion was lost by 11 to 3.

Dean Joiner moved that the draft be approved as amended. However, he withdrew his motion since Professor Cleary suggested that line 12 be amended to read: "or evidence of any statement by him be received for these purposes."

Coffee break was held from 10:55 to 11:20 a.m.

Mr. Erdahl moved approval of Professor Cleary's suggestion. Motion was seconded.

Mr. Epton moved that the last line be stricken. Dean Joiner seconded.

After a short discussion concerning affidavits and testimony, a vote was taken on Mr. Erdahl's motion for amendment of last sentence so that it reads: "Nor may his affidavit or any evidence of any statement by him be received for these purposes." Motion was carried by vote of 8 to 3.

Mr. Selvin moved that the words "or indictment" be stricken wherever they appear in Rule 6-06. There was a lengthy discussion concerning testimony which could be given by grand and petit jurors. There was a vote taken on the issue of policy of whether subsection 6-06(b) as proposed should or should not apply to grand jury proceedings. The majority favored application of subsection (b) as drafted to grand jury proceedings.

Dean Joiner moved that the last sentence of Rule 6-06(b) as amended be stricken. Motion was lost by vote of 7 to 6.

Judge Sobeloff moved for approval of 6-06(b) as amended. There was unanimous approval. The subsection, as approved, reads as follows: "Upon an inquiry into the validity of a verdict or indictment a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or any evidence of any statement by him be received for these purposes."

PROPOSED RULE OF EVIDENCE 6-07. WHO MAY IMPEACH.

Professor Cleary read the proposed rule and his comment thereto. During the discussion on cross-examination and impeachment, Mr. Williams said that the thing which disturbed him about the rule was that it gives an edge to the party who goes first with evidence. Judge Weinstein felt that the rule should be at least susceptible to some control by the judge with respect to order of proof. There was a very lengthy discussion concerning the pros and cons of being allowed to present witnesses in certain sequence. Mr. Haywood moved that the rule be amended by substitution of the words "who in good faith calls" for "calling". Judge Weinstein seconded. After a general discussion, vote was taken on the motion, and it was lost by 9 to 4. Judge Estes moved that Rule 6-07 be approved as written. Motion was carried by vote of 8 to 4.

Meeting was adjourned for lunch from 12:45 to 2:15 p.m.

Judge Sobeloff presided since Mr. Jenner had been detained at a luncheon.

PROPOSED RULE OF EVIDENCE 6-08. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME.

Professor Cleary read the proposed rule and his comment. [Mr. Jenner entered during this time.] Professor Cleary stated that his comment at p. 112 should have called particular attention to and contained a discussion on the seventh possibility - to recognize discretion in the trial judge. He cited Brown vs. United States, 370 F.2d 242, in showing how the court had expanded on its view taken in the case of Luck v. United States, 348 F.2d 763, 768-769 (D.C. Cir. 1965).

(a) General admissibility.

There was a short discussion during which Mr. Raichle expressed the feeling that the words "a time not unreasonably remote" were not necessary, since that phrase could be construed in many different ways. However, Mr. Jenner pointed out that the judge would use his discretion in the determination on the facts of the case presented before him.

Dean Joiner moved that subsection (a) be approved. Discussion ensued. Judge Weinstein would allow proof of prior crimes with respect to witnesses but not with respect to defendants. Mr. Williams felt that the rules should not delineate between accused and non-accused witnesses. A general discussion centered around the prox

and cons of allowing past crimes, misdemeanors, or felonies of witnesses and defendants to be brought out for the purpose of attacking credibility. Judge Estes moved that the phrase "at a time not unreasonably remote" be deleted from lines 3 and 4 of the proposed subsection. It was seconded. Motion was carried by vote of 8 to 5. Mr. Raichle moved that lines 6 through 8 be stricken and that a period be added at the end of line 5. Motion was lost for want of a second.

There was a short discussion concerning rehabilitation, state laws, and admission of testimony. Mr. Selvin moved that the Committee adopt in principle the exclusion from the use for impeachment of state crime having a rehabilatory procedure. However, he deferred his motion when the reporter suggested that that point would be covered under subsection (c). Mr. Selvin then moved that the Committee adopt in principle an exclusion from the use of conviction of crimes and impeachment the defendant in the criminal case. Motion was lost for want of a second. Mr. Spangenberg moved that impeachment by conviction of crime be limited to those crimes which involve moral turpitude. Dean Joiner seconded. Following a short discussion, the motion was lost by a vote of 9 to 3. [Judge Sobeloff was out of the room at this time.] Judge Estes moved that subsection (a) be approved as amended. It was seconded. Motion was carried by majority vote. One member was opposed.

At this time, Professor Cleary opened a discussion on juvenile adjudication. After hearing a few viewpoints, he said that he felt that the rule as drafted excludes juvenile adjudication because by definition they are not convictions. Judge Van Pelt suggested that the Committee proceed beyond the juvenile delinquency matter, and that if something developed within the next few months which warranted taking the matter up again, they could. Mr. Jenner suggested that at the outset of the July meeting, the reporter could present his thoughts after he had had a chance to read Justice Fortas' opinion concerning subject matter.

(b) Method of proof.

Professor Cleary read the proposed subsection and his comment thereto. Mr. Raichle asked if it were clear that in the case of the accused, the prosecution could not develop the fact of prior conviction on cross-examination. Professor Cleary replied that was correct. He explained that it had been offered in a few states in an effort to ameliorate somewhat the adverse effect upon the accused of proof of a prior conviction and thereby encouraging him to take the stand. Several suppositions of examination and cross-examination tactics were presented. Messrs. Spangenberg and Williams felt very strongly that it should be allowable to bring out prior convictions without having to satisfy the court first. After a very lengthy discussion, Mr. Williams moved that subsection (b) be stricken. Mr. Raichle seconded. Motion was carried by a vote of 7 to 4.

Meeting was adjourned from 4:58 p.m. on Thursday until 9:05 a.m. on Friday.

(c) Effect of pardon.

Professor Cleary read the proposed rule and comment.

There was a short discussion on means to prove the grounds of pardons. Mr. Jenner asked Mr. Erdahl to make an inquiry as far as federal practice is concerned and also as to state practices as to what is shown concerning pardons and reasons therefor.

Dean Joiner said he wondered if the Committee's position would not be simplified with very little damage, if any, to the process of judicial administration and perhaps some real advantage to the social policy involved if the Committee did not take a flat position that a man who had served out his sentence or had reached the stage where his civil rights were restored through the pardon process, that at that point in life, the showing of the conviction as a matter of impeachment not be permitted. Mr. Jenner asked for a discussion on the subject as a statement of policy. Following a short discussion, Judge Weinstein moved for elimination of subsection (c), and he intended that there be nothing in the rules concerning pardon, rehabilitation, or otherwise as far as impeachment is concerned. Mr. Berger seconded. Dean Joiner said that he would like to see included in subsection (a) what could be shown at this time - only the crime - that has not been pardoned or the person otherwise had his rights restored under state law or federal law. Mr. Spanganberg suggested an amendment to subsection (c) to show that if there was a pardon then crime could not be shown. After further discussion, a vote was taken on

Judge Weinstein's motion. Motion was lost by vote of 10 to 4. Judge Weinstein then moved that subsection (c) be written, subject to drafting changes, as follows: "If a pardon, certificate of rehabilitation or equivalent has been granted, a conviction is not admissible for the purpose of attacking the credibility of a witness." Mr. Spangenberg seconded. Motion was carried by a vote of 11 to 1. Three members did not vote.

Mr. Haywood moved that subsection (c) as amended be approved. Judge Estes seconded. Motion was carried unanimously.

(d) Effect of appeal pending.

Judge Weinstein moved that subsection (d) be stricken. Dean Joiner seconded. Mr. Williams asked Judge Weinstein if striking the second sentence only would satisfy him. Judge Weinstein agreed and withdrew his motion. Mr. Williams moved that the last sentence of subsection (d) be stricken. After a very short discussion, Mr. Williams withdrew his motion. Mr. Selvin moved that the second sentence of subsection (d) be amended to read in substance as follows: "Evidence of the pendency of an appeal is admissible." Motion was carried by unanimous approval. Mr. Spangenberg moved that subsection (d) as amended be approved. Dean Joiner seconded. Motion was carried unanimously. Mr. Epton moved that Rule 6-08 be approved as amended. However, there was no second to this motion.

Judge Sobeloff asked that the Committee reconsider the action through which the words "at a time not unreasonably remote" were stricken from Rule 6-08(a). Mr. Erdahl seconded. Motion was carried by a vote of 7 to 6.

Dean Joiner moved that the language which had been stricken in lines 3 and 4 of Rule 6-08(a) be restored. Mr. Erdahl seconded. [No vote taken on motion.] After a short discussion, Mr. Selvin stated that Judge Sobeloff moved that in lieu of "at a time not unreasonably remote" in lines 3 and 4 of subsection (a) of Rule 6-08, the words, "when a period of more than ten years has elapsed since the date of his release from confinement or the expiration of period of his parole, probation, or sentence, whichever is the later date" be used in an appropriate place. Judge Weinstein seconded. Motion was carried by a vote of 12 to 2. Judge Sobeloff moved for approval of Rule 6-08 as amended. Motion was carried by majority approval.

PROPOSED RULE OF EVIDENCE 6-09. RELIGIOUS BELIEFS OR OPINIONS.

Professor Cleary read the proposed rule and comment. After a short discussion, Mr. Berger moved that the following sentence be added: "Religious affiliation or interests may be shown when relevant." Judge Weinstein said that he preferred to have Rule 6-09 stricken completely and rely on Rule 6-01. Mr. Berger withdrew his motion. Mr. Spangenberg moved for the adoption of Rule 6-09 as submitted. Mr. Raichle seconded. Mr. Spangenberg

accepted an amendment from Dean Joiner, who moved that the last clause of the rule be stricken. Motion was carried by a vote of 9 to 4.

Recess was taken from 10:55 to 11:15 a.m.

Mr. Spangenberg moved that the following be substituted for lines 1 and 2 of the proposed draft: "The beliefs or opinions of a witness as to his own religious practices or lack of them are inadmissible." Mr. Berger seconded. Motion was carried by vote of 10 to 4. After a short discussion concerning the language it was decided that the motion was carried as far as the principle was concerned, but the reporter was to re-submit the rule at a subsequent meeting.

PROPOSED RULE OF EVIDENCE 6-10. CHARACTER OF WITNESS.

Professor Cleary read the proposed rule and his comment thereto.

(a) Limitation to truthfulness or untruthfulness.

Mr. Williams felt that the proposed rule was a reversal of the usual character evidence of the accused. Judge Weinstein pointed out that there is no rule which allows attacks on credibility general, and he asked if it was clear that attacks on credibility on the basis of bias and the likes is permitted. He felt that there were a lot of specific instances which were not all inclusive; that where the matter is covered the Committee was being all inclusive; yet, where the matter was not covered, they allowed the evidence to come in. He also felt that the whole

theory of what was and what was not being covered was very bothersome, because the Committee was taking little subjects and treating them in much detail and the big subjects were not being covered as well. Professor Cleary said that perhaps Rule 6-07 ought to be amplified a little, just to include a general provision that evidence bearing on credibility generally was admissible. During a discussion, Mr. Williams stated that if the same limitations which were put in the rules in the course of the morning session were imposed, it would look a little silly, because the examiner had been inhibited from eliciting convictions because of antiquity, but he had not been inhibited from eliciting arrests, indictments, firings, and rumors that are 25 or 20 years old. Professor Cleary replied that in the morning session the Committee was dealing only with impeachment by conviction and one could not impeach under general principles by collateral evidence of arrests, etc. After a discussion concerning veracity, Mr. Berger moved that the Committee reconsider action taken on Rule 6-08. Mr. Spangenberg seconded. Motion was lost by vote of 7 to 6. Mr. Erdahl moved that the clause,"other than conviction of crime as provided in these rules", in lines 13 and 14, p. 120, be stricken. Mr. Spangenberg seconded. The motion was lost by a vote of 12 to 2. Judge Weinstein moved that lines 13 and 14 be amended by striking "other than conviction of crime as provided in these rules" and inserting before the word "may" in line 15 the following: "specific instances of his conduct occurring within

the preceding 10 years". After a short discussion, a vote was taken and the motion was lost by 9 to 5. Mr. Selvin moved that the words, "of the witness who testifies to the reputation or opinion", be added at the end of line 16 on page 120. After another short discussion, a vote was taken and motion was carried by the majority. Judge Weinstein moved that lines 13 through 16, as amended, be stricken. Mr. Berger seconded. When it was pointed out to him that his motion would not accomplish what he was after, Judge Weinstein withdrew the motion. He then moved that the sense of the language be that the witness who testifies to the reputation shall not be cross-examined with respect to specific instances of misconduct. Mr. Berger seconded. Motion was lost by vote of 13 to 1. Judge Weinstein moved that lines 13 and 14 down to the word "may" read in substance as follows: "specific instances of his conduct other than conviction of crime provable under Rule 6-08(a)". There was no second and motion was not entertained. Dean Joiner asked the need for subsection (a) and Professor Cleary replied that it was designed to cover the point of eliminating the possibility that the character might be attacked other than tendered by reputation or opinion.

Mr. Selvin moved that, in line 12 after the word "provable", the word "only" be inserted. Judge Sobeloff seconded. After brief discussion, the motion was lost by a majority vote.

Mr. Williams moved that the whole section be stricken as being archaic and as having no place at all in the conduct of a trial. The Chair did not entertain the motion, as some members still wished to make amendments. Professor Cleary suggested that in line 3 of subsection (a) after the word "witness" the words, "reputation or opinion", be inserted and in subsection (d) lines 11 and 12 be stricken. Dean Joiner said that it seemed to him that the whole Rule [6-10] is aimed not at the broad problem of attacking or supporting the credibility of the witness but at the narrow problem of attacking and supporting the credibility of a witness by opinion or reputation. If that was the case, he felt that the wording should be: "For purposes of attacking or supporting the credibility of a witness by opinion or reputation, evidence as to character is limited to truthfulness or untruthfulness." Mr. Haywood moved that the reporter's suggested language be inserted in subsection (a) and that the first sentence in subsection (d) be eliminated. Mr. Epton seconded. Motion was carried by a vote of 7 to 1. Five members did not vote.

Mr. Williams moved that Rule 6-10(a) read as follows: "For purposes of attacking or supporting the credibility of a witness, evidence of his character is inadmissible,", and that (b), (c), and (d) be stricken.

Meeting was adjourned for lunch from 1:02 to 2:05 p.m.

Judge Sobeloff presided since Mr. Jenner had been detained.

Mr. Williams said he wanted to preserve the law on character evidence insofar as it affects the defendant in a criminal case, but he did not think that Rule 6-10 as a whole served any useful purpose. During a lengthy discussion, the issues of the Giles case were set forth. [Mr. Jenner returned at this time.] After further discussion, Judge Weinstein offered an amendment to Mr. Williams' proposal and suggested following language: "For purposes of attacking or supporting the credibility of witness, evidence of his reputation for veracity is inadmissible." He stated that this would eliminate subsections (b), (c), and (d). Mr. Williams accepted the amendment to his motion. Motion was carried by a vote of 10 to 2. Two members did not vote. Judge Weinstein moved to approve Rule 6-10 as amended. Motion was carried by vote of 11-0.

Mr. Williams suggested that in line with what the Committee has to re-look at by virtue of what was done to Rule 6-08, that the reporter re-look at what was done with respect to character evidence on the accused, with the objective being that there may be a rather glaring inconsistency in policy if there is a 10-year rule on convictions for impeaching witnesses and the matter of impeachment of character witnesses with respect to the defendant's conduct for 30, 40, or 50 years was left wide open. Mr. Jenner stated that that issue would be before the Committee when the redraft is submitted in July.

PROPOSED RULE OF EVIDENCE 6-11. MODE OF INTERROGATION SUBJECT TO CONTROL BY JUDGE.

Professor Cleary read the proposed rule and suggested insertion of "and order" after the word "mode" in line 2. Dean Joiner moved that after the word "interrogation" in line 4 the following be added: "and presentation". Judge Sobeloff seconded. Motion was carried by majority approval. One member was opposed.

Mr. Raichle moved that the words "as effective as possible for the ascertainment of the truth" be substituted with the words "for the development of all of the facts." Mr. Berger seconded. After a brief discussion, vote was taken and motion was lost for lack of any affirmative votes. Mr. Spangenberg moved that the word "shall" in line 2 be changed to "may"; striking out words after "evidence" in line 3 down through "and (3)" in line 6 and adding "and shall" before "protect" in line 6. Mr. Berger seconded. The majority opposed the motion and it was lost. Mr. Raichle moved that Rule 6-11 as amended be eliminated. Mr. Berger seconded. Motion was lost by vote of 8 to 6. Mr. Spangenberg moved that the word "shall" in line 2 be changed to "may". Judge Sobeloff seconded. Motion was lost by majority opposition. Mr. Spangenberg moved that Rule 6-11 as amended be approved. It was seconded. Motion was carried by vote of 8 to 5.

PROPOSED RULE OF EVIDENCE 6-12. LEADING QUESTIONS.

Professor Cleary read the proposed rule and comment thereto. Mr. Berger moved that in line 1, the word "not" be inserted after "may" and "except" after "witness" in line 2; strike "full" in line 3. Mr. Williams seconded. Mr. Williams suggested the elimination of "and on cross-examination", and Mr. Berger accepted that amendment to his motion. Mr. Epton suggested the changing of the word "knowledge" to "testimony" in line 3, and Mr. Berger accepted that amendment also. Motion was carried by a vote of 11 to 2.

Dean Joiner moved that the following sentence be added: "Leading questions may be used on cross-examination." Mr. Berger seconded. Following discussion, Professor Cleary suggested the following wording: "Leading questions may be asked as a matter of right on cross-examination except when the witness is identified with the cross-examiner." Dean Joiner accepted that amendment to his motion. The motion was carried by a vote of 10 to 2. There was a general discussion on the matter of how to ascertain the identity of anyone with the cross-examiner. Mr. Erdahl pointed out that there was a little constitutional difficulty in the sentence at lines 4 and 5, since a party is not entitled to call an adverse party in a criminal case. Mr. Erdahl moved to have the words, "in civil cases" inserted at the beginning of line 4. It was seconded, and motion was carried unanimously. Mr. Spangenberg moved that the rule as amended be approved.

Professor Wright asked if it would not be desirable to add something as to what happens after the adverse party has called him [the witness?] and his own lawyer takes over. Professor Cleary said that he thought that was taken care of by the sentence, "Leading questions may be asked as a matter of right on cross-examination except when the witness is identified with the cross-examiner." Mr. Estes moved that "as a matter of right" be stricken. Professor Green seconded. Discussion on this rule was suspended until after the discussion on Rule 6-14.

Recess was taken from 4:05 to 4:15 p.m.

PROPOSED RULE OF EVIDENCE 6-14. SCOPE OF CROSS-EXAMINATION.

Professor Cleary read the proposed rule and his comment thereto. Mr. Williams felt that the rule as drafted was unconstitutional, because it would give the prosecutor the right to elicit testimony from the witness on an offense to which the witness did not choose to testify. The New Jersey Johnson case was discussed. During a rather lengthy discussion, Mr. Selvin said, with respect to criminal prosecutions, that even assuming the situations which Mr. Williams supposed, it would be constitutionally permissible to subject the witness to the broader scope of cross-examination, it seemed to him that as a matter of fairness and as a matter of practicality, the witness should not be subjected. He felt that the Committee was assuming too narrow an interpretation of the term "the scope of the

direct examination". He thought that by broadening the scope of examination the opponent of the party who is in the process of putting on his case was given a pretty good means of breaking up the order lead of the efficient and impressive presentation of the case that the party is putting on. It seemed to him that the Committee would be complicating the seminars and the practical, as distinguished from the impractical, way of testifying for the truth. He felt that the Rule would be too much of a burden, because all witnesses would have to be as fully prepared as possible to testify on every point in the case - no matter how minor his testimony might be.

Meeting was adjourned on Friday at 5:00 p.m. and was resumed on Saturday at 8:43 p.m.

PROPOSED RULE OF EVIDENCE 6-14. SCOPE OF CROSS-EXAMINATION.

Professor Cleary explained that the Committee had looked at the rule and comment and said that they had sort of zeroed in on the discussion of the problem raised by subsection (b). Mr. Jenner stated that he would abhor open cross-examination. There was a very lengthy general discussion concerning open cross-examination during which several members set forth practices of their states and gave examples of tried cases. Judge Weinstein saw no real need for subsection (a) of Rule 6-14 and suggested that the material could be put into Rule 6-11. Judge Sobeloff agreed. Mr. Raichle felt that the limited cross-examination was most desirable. After further discussion, Mr. Jenner suggested that a vote be taken on whether or not the Committee desired unlimited cross-examination as stated in the first sentence of Rule 6-14. Judge Sobeloff presented his proposal for the language of the rule. However, Mr. Jenner stated that at this time, the Committee would vote on whether or not it desired a rule of unlimited cross-examination. The motion was lost by a vote of 7 to 6 among those present, and Mr. Jenner stated that he had been asked by Judge Van Pelt and Mr. Selvin to have it recorded that they too were opposed to unlimited cross-examination.

Judge Sobeloff moved that the first sentence of Rule 6-14 read: "Cross-examination should generally be limited to the subject matter of the direct examination but the court may in the exercise

of discretion under Rule 6.11 permit broader cross-examination and in that event it may impose appropriate restrictions on the use of leading questions in the same manner as on direct examination." Judge Van Pelt suggested the deletion of the words "under Rule 6.11" and Judge Sobeloff accepted. Professor Cleary suggested "judge" rather than "court" and "he" instead of "its", and Judge Sobeloff agreed to those changes. Mr. Spangenberg said that this new wording would not allow him to cross-examine his own witness. Mr. Williams suggested deletion of the word "generally" and Judge Sobeloff also agreed to that. Judge Weinstein suggested an amendment to have the language read: "Cross-examination should be limited to the subject matter of the direct examination, but the judge may in the exercise of discretion permit broader cross-examination." Mr. Berger moved to have the words "for the convenience of the parties or the effective conduct of the trial" reinstated in the amended language. Mr. Spangenberg seconded. After a short discussion, Professor Cleary suggested that material of Rule 6-14 be picked up in Rule 6-11 as a separate subsection, since it was dealing with the area covered under Rule 6-11. Mr. Spangenberg withdrew his second to Mr. Berger's motion. He then moved to eliminate the word "cross" at the end of the amendment made by Judge Sobeloff. Dean Joiner seconded. Professor Cleary suggested that the language "inquiry into additional matters" be substituted for "broader cross-examination" and Mr. Spangenberg accepted that change which Dean Joiner seconded. Mr. Spangenberg

accepted Mr. Williams' suggestion and agreed to have the words "as if on direct examination" added to his amendment. Dean Joiner withdrew his second. Mr. Williams seconded Mr. Spangenberg's motion. Motion was carried by a vote of 8 to 3.

Mr. Erdahl moved for the adoption of language as amended by Judge Sobeloff. After a very brief discussion, motion to approve subsection (a) as amended was carried by vote of 9 to 2.

Rule 6-14(a) as approved reads: "Cross-examination should be limited to the subject matter of the direct examination, but the judge may in the exercise of discretion permit inquiry into additional matters as if on direct examination."

Judge Weinstein moved that the subject matter of Rule 6-14(a) be incorporated in Rule 6-11. Motion was carried by vote of 7 to 4.

PROPOSED RULE OF EVIDENCE 6-12. LEADING QUESTIONS.

Professor Cleary read the rule as it then stood as the following: "Leading questions may not be used on the direct examination of any witness except insofar as necessary to a development of his testimony. Leading questions may be asked as a matter of right on cross-examination except when the witness is identified with the cross-examining party. In civil cases a party is entitled to call an adverse party or witness identified with him and interrogate him by leading questions."

Judge Weinstein suggested that the language should be: "Leading questions shall not be permitted where their effect may be to substitute the questioner's knowledge to that of a witness."

Since the reporter saw problems with the suggestion, the matter was dropped. Mr. Epton moved for approval of Rule 6-12 as amended. Mr. Williams moved that the reporter delineate on what is meant by the words "identified with him". Mr. Spangenberg pointed out that the reason that language was put in was because earlier the Committee had been talking about unlimited cross-examination. He said that now that the Committee had decided on limited cross and was allowing inquiry as if on direct examination, he did not think the language was needed. On the matter of cross-examining hostile witnesses, Mr. Spangenberg did not think the Committee should undertake to change Rule 43(b) of the Federal Rules of Civil Procedure. He moved to amend the second sentence of Rule 6-12 so that it would read: "Leading questions shall be permitted on cross-examination." Judge Estes seconded. Mr. Spangenberg accepted an amendment to his motion so that it was now that the first sentence would read: "Leading questions should not be used on the direct examination of any witness except insofar as necessary to a development of his testimony.", and the second sentence would read: "Leading questions should be permitted on cross-examination." Judge Weinstein seconded that motion, and it was carried by majority approval. Mr. Williams moved that the last sentence read: "A party in entitled to call an adverse party except a defendant in a criminal case or witness identified with him and interrogate him by leading questions.", in principle, and the reporter could work out the language. Mr. Berger seconded. Motion was carried unanimously.

Professor Green wanted to add a provision to the effect that there be a ruling that the trial judge in allowing or disallowing a leading question is reviewable only for abuse of discretion. Motion was lost for want of a second.

Mr. Spangenberg moved for the adoption of Rule 6-12 in its present form, i.e., the first two sentences as approved and including the third sentence which reads as: "A party is entitled to call an adverse party [except an accused on trial] or witness identified with him and interrogate him by leading questions." Motion was carried by majority approval.

PROPOSED RULE OF EVIDENCE 6-13. WRITING USED TO REFRESH MEMORY.

Professor Cleary read the proposed rule and his comment thereto. Mr. Epton moved for its approval and Mr. Berger seconded. Judge Weinstein asked the reporter if language of lines 5 and 6 meant that the portions of subject matter were to be introduced for all purposes or just on the issue of credibility. The reporter replied that he supposed that would depend on the nature of the subject matter. Mr. Epton moved that a period be used at the end of line 4 and that lines 5 and 6 (ending with word "witness") be eliminated. Mr. Berger seconded. After a short discussion, vote was taken and motion was lost by count of 9 to 3. Vote was taken then on approval of Rule 6-13 as submitted by reporter. Motion was carried by count of 8 to 0.

[Professor Moore opened up short discussion on "canned evidence".]

PROPOSED RULE OF EVIDENCE 6-14. SCOPE OF CROSS-EXAMINATION.

(b) Accused in criminal case.

Since there seemed to be a few constitutional questions on this proposal, the reporter was to reflect further on the subject matter and resubmit the proposed rule at a later meeting.

PROPOSED RULE OF EVIDENCE 6-15. PRIOR STATEMENT OF WITNESS.

Professor Cleary read the proposed rule and his comment. After a few members had pointed out that they were confused with the proposed wording, the reporter said that he had inadvertently omitted some of his original language, and he would resubmit the rule at a later meeting. After a short discussion, it was stated that the view of the Committee was that it not be required to show statement of witness to him before impeachment. Mr. Williams stated that he was in disagreement with subsection (a) as it was unfair to the witness. He thought that the policy of the Committee ought to be that at some point in the cross-examination for impeachment purposes, the witness be allowed to see the document (statement made by him). After discussion, Professor Cleary suggested the insertion of the following language in subsection (b) between lines 5 and 6: "the witness is afforded an opportunity to explain or deny and". Judge Sobeloff moved

that at the end of the first sentence the following language be added: "in advance of the questioning, but the statement shall be shown to the witness and to opposing counsel before the witness leaves the stand, to allow an opportunity for any further explanation." Mr. Spangenberg asked Judge Sobeloff if he would accept a substitute motion that on policy only it was the sense of the Committee that at some time before the witness leaves the stand, the statement shall be shown to the opposing counsel at his request. Judge Sobeloff accepted. Mr. Jenner stated that with appropriate refinery of language it was the sense of the Committee as a matter of policy that (a) the statement be required to be produced, and (b) it is going to be required to be produced sometime after the completion of the credibility examination. There was further discussion concerning oral statements and the problems involved. The reporter was to consider all the arguments presented and redraft Rule 6-15 in accordance with matters of policy decided on and report at a later date.

PROPOSED RULE OF EVIDENCE 6-16. CALLING AND INTERROGATION BY JUDGE.

Professor Cleary read the proposed rule. Mr. Epton moved for its adoption. Mr. Williams seconded. After hearing views from Messrs. Jenner and Spangenberg, Mr. Epton suggested that the second sentence read as follows: "The parties need not object to questions when asked nor to evidence thus adduced in order

to preserve error for review." Mr. Jenner stated that it was the tenor of the Committee that, as a matter of policy, that sometime before the jury leaves the bar, the parties be required to state their objections and make any motions with respect thereto. Professor Wright asked the reporter why he had not said anything about the right of the party to examine witnesses called by the court? It was decided that the reporter would redraft and resubmit the rule.

PROPOSED RULE OF EVIDENCE 6-17. EXCLUSION OF WITNESSES.

Professor Cleary read the proposed rule and his comment thereto. Mr. Spangenberg objected to the proposals within the rule. Mr. Williams moved that the rule be amended by the insertion of a period after "cause" in line 9 and that the balance of the language through line 14 be stricken. He definitely did not like the idea of non-communication with other persons. There was no second to his motion.

After discussion, Mr. Williams moved that the following language be stricken from lines 9 and 10: "but the person thus exempted from exclusion may be required to testify prior to other witnesses for his side.", and that a period be added after the word "cause" in line 9. Mr. Spangenberg seconded. After short discussion, vote was taken on Mr. Williams' motion, and it was carried by count of 6 to 1.

Judge Weinstein suggested that there be added after the word "persons" in line 12, the following words: "to learn the testimony of other witnesses." Mr. Williams suggested the word "management" be used for "presentation" in line 8. There was no objection. After general discussion, Judge Weinstein moved that the last sentence be stricken. Judge Estes seconded. Motion was carried by a vote of 7 to 0.

Vote was then taken on Judge Weinstein's earlier motion. It was carried by count of 6 to 0. Mr. Spangenberg moved that the sentence beginning at end of line 10 and ending with the word "persons" in line 12, as amended, be stricken. Mr. Williams seconded. Motion was lost by vote of 6 to 3.

Judge Weinstein moved that the rule, as amended, be adopted. Mr. Spangenberg seconded. Motion was carried by vote of 7 to 0. Rule 6-17 as approved reads: "At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own motion. This rule does not authorize exclusion of a party who is a natural person, or of an officer or employee of a party which is not a natural person designated as its representative by its attorney, or of a person whose presence is shown by a party to be essential to the presentation of his cause. The judge may also order witnesses not to communicate

with other persons to learn the testimony of other witnesses."

It was announced that the next meeting would be held on the dates of July 6, 7, and 8, 1967.

Meeting was adjourned on Saturday at 1:00 p.m.