

ADVISORY COMMITTEE ON RULES OF EVIDENCE

MINUTES

Meeting held on Friday, June 18, 1965
Supreme Court Building, Washington, D. C.

*Official minutes for
this mtg. This was
never mailed to the
Comm. Prepared by
Mrs Williams*

The first meeting of the newly appointed Advisory Committee on Rules of Evidence met in Room 22B of the Supreme Court Building on Friday, June 18, 1965, at 9:30 a.m. Those in attendance were Messrs. David Berger, Hicks Epton, Robert S. Erdahl, Egbert L. Haywood, Frank G. Raichle, Herman F. Selvin, Craig Spangenberg, Judges Joe Ewing Estes, Simon E. Sobeloff, Robert Van Pelt, Professors Thomas F. Green, Jr., Charles W. Joiner, Jack B. Weinstein, Edward W. Cleary, Reporter for the Committee, and your Chairman, Albert E. Jenner, Jr. Mr. Edward Bennett Williams was unable to attend, being hospitalized at the time. Also present were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, Professors James William Moore and Charles Alan Wright, also of the standing Committee, and Mr. William E. Foley, Deputy Director of the Administrative Office of the United States Courts. Mr. Will Shafroth, Secretary to the Committee and former Deputy Director of the Administrative Office, was present for part of the morning session.

Judge Maris welcomed the new committee and explained the purposes and workings of the various rules committees, authorized under 28 U.S.C. 331, as amended in 1950. He went on to discuss the Special Committee on Evidence which had been appointed by the Chief Justice on the approval of the Judicial Conference in March, 1961, under the chairmanship of Professor James William Moore with Professor Thomas F. Green as reporter, to study the feasibility and advisability of formulating rules of evidence which would apply uniformly in all United States district courts. The conclusion of this special committee's study was that the formulation of uniform rules of evidence for federal courts is both desirable and advisable and that a drafting committee be appointed to draw up such uniform rules of evidence which would be submitted to the bench and bar for comments, presented to the Judicial Conference and the Supreme Court for approval and finally submitted to the Congress for legislative action. The present committee is the outcome of that study and subsequent report of the Special Committee on Evidence.

Judge Maris then stated that appointments to the various committees were for periods of four years but that at the

order, in order to have staggered terms, half the members would be appointed for two years and the remaining half for four years. The members drew lots, Judge Maris drawing for Mr. Williams, with the result that Messrs. Erdahl, Kischle, Selvin, Professors Green, Joiner, Weinstein and George Van Pelt have initial terms of four years and Messrs. Messner, Epton, Haywood, Spangenberg, Williams, and Judges Hosen and Sobeloff terms of two years. Of course, the Chairman and the Reporter, Professor Cleary, are automatically appointed for full four year terms. Judge Maris then turned the floor over to Mr. Foley.

Mr. Foley told the Committee that as representative member of the Administrative Office, it was his pleasure and duty to assist in every way possible, supplying clerical help as needed and furnishing necessary supplies, such as stationery, franked envelopes, etc. He requested the Committee to send in at least twenty-five copies of all completed material which was to be transmitted by the Administrative Office and assured them that material sent in to the office for duplication would be taken care of promptly. In this connection, the Chairman interjected the comment that copies of letters sent to any member of the Committee should be sent to all and that, if

necessary, they could call on the Administrative Office for assistance in so doing. Mr. Foley also mentioned that ordinarily the Committee would meet in Room 22E, the Administrative Office Conference Room, and would have the benefit of a soundscribing machine to record the meeting verbatim.

Mr. Shafroth then said a few words explaining his past connection with the committees and stating that he was now retired and would no longer participate actively in committee affairs.

The Chairman next introduced Professor Cleary, telling briefly of his background and the tremendous advantages he brings to the Committee as its reporter. He mentioned that at present he expects the Committee will meet on an average of thrice yearly. At this point, the importance of confidentiality of the discussion matter of the meetings, at least in its tentative stage, was stressed, with Judge Haris emphatically concurring. It was also decided that the Committee should henceforth be known as the "Advisory Committee on Rules of Evidence" and that the word "Uniform" should not be included in its title. The Chairman then discussed the entire scope

of the project of the Committee and touched on the issue of federal-state relations which arise particularly in diversity cases. The floor was then relinquished to Professor Cleary.

Professor Cleary, by way of introduction, listed several materials concerned with evidence and to which this Committee would possibly be referring: Wignore on Evidence, McCormack on Evidence, a collection of law review articles, edited by a committee of the American Law School Association, the Model Code of Evidence, promulgated by the American Law Institute, Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws and the Report of the California Law Revision Commission. At this point, he asked Mr. Solvin to say a few words with regard to the California study.

Mr. Solvin said it was the task of the California commission to study and report to the California legislature on the feasibility of adopting uniform rules of evidence in California. The result of its study was a proposed evidence code which the legislature adopted, with few changes, and which is now law although it will not be in effect until January 1, 1967.

Professor Cleary then continued by outlining several attempts which have been made to codify rules of evidence, such as in Georgia, Missouri, Virgin Islands, Canal Zone and Kansas. In this connection, the Chairman mentioned that he had had some correspondence with Professor Cross of Oxford concerning Britain's attempt at promulgating rules of evidence and asked Judge Maris if there would be any infraction in an exchange of materials and views between this Committee and the two committees (one for civil and one for criminal) in England. Judge Maris assured the Chairman that there would not be.

The afternoon session consisted mainly of a discussion by the members of the Committee, with Professor Cleary presiding, on the scope of the Committee's undertaking. Professor Cleary called the members' attention to the tables of contents which they had received of the Model Code of Evidence, Uniform Rules of Evidence, and the California Proposed Evidence Code which could serve as guidelines to the problems which would probably confront this Committee.

Directing attention then to his Memorandum No. 1, Professor Cleary gave a historical account of Supreme Court

decisions, beginning with the much quoted and highly controversial Eric case (1933), down through Black v. Black (1941), Pagan v. Merchants Transfer and Warehouse Co., Woods v. Interstate Realty Co. and Cohen v. Beneficial Industrial Loan Corp. (1949), Bernhardt v. Polygraphic Co. (1953), Ford v. Blue Ridge Electric Cooperative, Inc. (1958), Risk v. New York Life Insurance Co. (1959), to Schlagenhaft v. Holder and, finally, Hanna v. Plumer (April 26, 1965).

Professor Cleary pointed out that the Hanna decision is of great importance to this Committee as it can be construed as a directive by the Court for this Committee to cover completely the area conventionally considered to fall within the field of evidence. This would include all topics included in the Model Code and the Uniform Rules.

A general discussion then ensued as to the problems facing this Committee in setting up rules of evidence which might produce a conflict in diversity cases, especially in the areas of presumption, burden of proof and privilege. There was argument on both sides as to the supremacy in these areas of federal rule over state but the final consensus of the Committee was that it is their duty and obligation, after full study and investigation, to submit to the bench and bar

a proposed set of uniform rules of evidence which will be of the utmost benefit to judges, prosecutors, lawyers and the profession in general, as well as the country as a whole.

Following a brief discussion as to the agenda for the next meeting, the motion was made and seconded that the Chairman and Professor Cleary will confer and draft an agenda which will be sent to all the members of the Committee, together with any pertinent material thereto, in ample time for study and consideration prior to the meeting. The Chairman also stated that he will in the near future send to all members a copy of the Kansas Code, which contains the Kansas Evidence Act, and a copy of the Hanna opinion.

A motion was then made and seconded that the Committee will next meet on October 21, 22 and 23 in the Conference Room of the Administrative Office of the United States Courts, Supreme Court Building, Washington, D. C.

The meeting adjourned at 4:45 p.m.

Respectfully submitted,

Albert E. Jenner, Jr.
Chairman

June 21, 1965