D-R-A-F-T

MINUTES OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE MEETING OF JULY 6-8, 1967

The tenth meeting of the Advisory Committee on Rules of Evidence was convened in the ground floor conference room of the Supreme Court Building on Thursday, July 6, 1967, at 9:10 a.m., and was adjourned on Saturday, July 8, 1967, at 12:58 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 (Unable to attend on Thursday)
Herman F. Selvin
Simon E. Sobeloff
Craig Spangenberg
Robert Van Pelt
Jack B. Weinstein
Edward Bennett Williams
Edward W. Cleary, Reporter

The chairman welcomed the members and stated that he was quite pleased with Dean Ladd's recent letter. Copies of the letter had been mailed to all members of the Committee, and after a few general remarks were made, the reporter proceeded with the rules to be discussed.

Agenda Item No. 1 - Memorandum No. 16

PROPOSED RULE OF EVIDENCE 5-01. PRIVILEGES RECOGNIZED ONLY AS PROVIDED.

Professor Cleary read the text and his comment thereto. Dean Joiner felt that there was an ambiguity in subsection (b) and he suggested that it be amended to read: "To refuse to disclose any matter or"; have subsection (c) read: "To refuse to produce any object or writing; or", and make the reporter's proposed subsection (c) read (d). Mr. Jenner felt that it would be better draftmanship to put the word, "to", after the word, "privilege", in line 5 and strike the word, "to", at the beginning of subsections (a), (b), and (c). Professor Green questioned whether or not the word, "object", was sufficient. He said there had been some effort to apply privileges to things like blood tests, breath tests, etc., and he wondered if that would be considered object or substance. After discussion, Judge Weinstein moved that lines 5 through 10 be amended to read:

"has a privilege to:

(a) Refuse to be a witness; or

(b) Refuse to disclose any matter; or

(c) Refuse to produce any object or writing; or

(d) Prevent another from being a witness or disclosing or producing any matter, object, or writing."

Judge Estes moved for adoption of the proposed wording. Professor Cleary stated that subsection (d) should be parallel to subsections (b) and (c). There was unanimous approval.

Rule 5-01 as adopted reads:

> "Privileges recognized only as provided. Except as otherwise required by the Constitution of the United States or provided by act of Congress, and except as provided in these rules and in the Rules of Civil and Criminal Procedure, no person has a privilege to:
>
> (a) Refuse to be a witness; or
>
> (b) Refuse to disclose any matter; or
>
> (c) Refuse to produce any object or writing; or
>
> (d) Prevent another from being a witness or disclosing any matter or producing any object or writing."

Mr. Jenner questioned whether rules other than those of Civil and Criminal Procedure needed to be included in line 4. He felt that the argument might be presented that this rule of evidence did not apply to trials in the bankruptcy courts. Judge Weinstein said that he would prefer a phrase in line 4 to run something like "and except as the law of another jurisdiction relating to the privilege may be recognized in other courts". Judge Van Pelt asked if it were not intended to eliminate the matter of local privileges by the adoption of evidence rules of this kind in order to have uniform rules. Mr. Jenner stated that the Committee had decided that point as a matter of policy, and Judge Weinstein did not pursue the subject. Mr. Jenner asked the reporter to make a note of the fact that there is no reference to the bankruptcy rules

in line 4 and the reporter stated that he would check out the bankruptcy rules.

PROPOSED RULE OF EVIDENCE 5-02. DETERMINING EXISTENCE OF PRIVILEGE.

Professor Cleary read his comment, which explained that this rule was being left open for consideration along with the treatment of preliminary questions of fact generally.

PROPOSED RULE OF EVIDENCE 5-03. LAWYER-CLIENT PRIVILEGE.

Professor Cleary suggested that subdivision (3) of subsection (a) be stricken, and he wished to amend subsection (b) by the addition of the words "or his representative" at the end of line 28 and the insertion of the words "or his lawyer's representative" after the word "lawyer" in line 29. He then read the proposed rule and comment. After an extensive discussion on the meaning of the word "officer", it was moved and seconded that in line 1, the word "public" be added after "person" and the word "or" be added after "officer". The word "public" before "officer" was used in conformity with Rule 25(d) of Federal Rules of Civil Procedure. Motion to amend line 3 was carried unanimously. Mr. Selvin questioned the simultaneous usage of "professional legal services" and "professional services" and felt that perhaps the same

terminology should be used throughout the rules. It was agreed that "professional legal services" would be the term used.

Professor Cleary suggested that in lieu of lines 8-12 of the second draft, the following be used: "A minor or an incompetent person may be a client." After a short discussion, Judge Weinstein moved that the second sentence be stricken and that no written substitution be inserted. Dean Joiner seconded. Motion was carried unanimously. Rule 5-03(a)(1) as approved reads:

> "A 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."

Professor Green moved approval of subdivision (2). Second was assumed, and the motion was carried unanimously. Rule 5-03(a)(2) as approved reads:

> "A 'lawyer' is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation."

Mr. Haywood moved that subdivision (3) be stricken with the understanding that the subject matter will be covered in subsection (b). Motion was approved unanimously. By this action, subdivisions (4) and (5) of the second draft were renumbered (3) and (4), respectively.

Judge Sobeloff asked if an expert, who had been asked by the lawyer to help on a case, was subject to interrogation. Professor Cleary replied that an expert would be considered a manager - sort of an associate lawyer - and would not be called as a witness. Mr. Jenner read the related proposed Civil Rule 26, which is as follows:

. . .

> "[A] party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.
>
> "As an alternative or in addition to obtaining discovery under subsection (A) [above paragraph], a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert will testify. Thereafter, any party may proceed by an appropriate method to discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter.
>
> "Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or to be given on direct examination at trial.
>
> "The court may require that the discovering party pay the expert a reasonable fee for time spent in responding to discovery, and, require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert."

Mr. Spangenberg said that he was troubled very much by the omission of the words,"or to consult a lawyer",from the second draft of the rule, and he moved that the original draft language be reinstated. After a short discussion, a vote was taken, and the motion was lost by count of 6 to 5. Since the vote was so close, Mr. Jenner asked for further discussion. Mr. Selvin moved that the words,"one having authority", be substituted with the words, "who is authorized or directed by the client". There was no second to the motion, but Mr. Spangenberg explained more fully just why he thought the original draft language "to obtain legal services or to consult a lawyer" should be retained. Judge Weinstein moved for reconsideration of Mr. Spangenberg's earlier lost motion. Motion was seconded and it was carried by a vote of 6 to 5. Mr. Jenner stated that the following proposals had been made during the course of the earlier discussion: (1) that "Representative of the client is one authorized or directed to obtain professional legal services." be used for subdivision (3); (2) Mr. Spangenberg's motion which was to have the subdivision read: "Representative of the client means one having authority to obtain legal services or to consult a lawyer for legal advice."

Judge Weinstein moved that line 19 read: "authority to obtain professional legal services or to consult a lawyer for legal advice or to act on advice". Judge Van Pelt suggested that line 19 read: "authority to obtain professional legal

services or to receive or act on advice". Mr. Spangenberg accepted the suggestion. After reading the definition of the word, "obtain", Mr. Spangenberg withdrew his acceptance of Judge Van Pelt's suggestion. A vote was then taken on Judge Weinstein's motion to have subdivision (3) read: "Representative of the client means one having authority to obtain professional legal services or to consult a lawyer for legal advice or to act on advice rendered pursuant thereto on behalf of the client." Motion was lost by count of 7 to 5. After a short discussion, Mr. Haywood moved that subdivision (3) read: "Representative of the client is one having authority to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the client." Judge Weinstein seconded. Motion was carried unanimously.

Subdivision (5) of second draft - renumbered (4).

Professor Cleary read the subdivision and his comment thereto. Mr. Jenner asked if it was clear what is covered by "if not intended". The reporter replied that it was his understanding that the intent would be that of the individual who represented a corporation or of the single speaker, and Mr. Jenner was satisfied with that explanation. Judge Sobeloff moved that subdivision (4) be approved as amended. Mr. Selvin seconded. Motion was carried unanimously. Subdivision (4) as approved reads as follows: "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of

professional legal services to the client or those reasonably necessary for the transmission of the communication."

Dean Joiner felt that "representative of the lawyer" should be defined in this rule.

There followed an extensive tangential discussion during which Rule 16(b) of the Federal Rules of Civil Procedure was read in support of procedure followed by Judge Estes.

Dean Joiner moved that as a matter of policy there be a definition of "representative of the lawyer". After a seconding of the motion, it was carried by vote of 9 to 1, and the reporter is to submit language at a subsequent meeting.

(b) General rule of privilege.

Professor Cleary read the text of the proposed subdivision with the additional phrases ;or his representative" at the end of line 28; "or his lawyer's representative" after the first word,"lawyer",in line 29; and the word,"professional", before the word, "legal", in line 32. Mr. Epton asked if line 32 could not read: "for the purpose of rendering professional legal services to". Professor Cleary explained that the rendering of services was not the purpose per se, but that the purpose of the communications was to facilitate the rendition.

[Lunch from 1:05 p.m. to 2:17 p.m.]

Mr. Williams felt that subdivision (3) of subsection (b) should be ended with the word, "interest", because the meaning

contained in the balance of the clause was contained already in subdivision (4) of subsection (a). Professor Cleary replied that the language in subdivision (4) informs when a communication is "confidential". He said that if (b)(3) were left as Mr. Williams suggested, the meaning would be too broad. Mr. Selvin suggested that subsection (b) be revised to read: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made, for the purpose of facilitating the rendition of professional legal services to the client, by the client or his lawyer to a lawyer representing another in a matter of common interest." Professor Cleary suggested that the wording be: "or (3) made, for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest." Judge Sobeloff suggested that the word, "made", be inserted after "communications" in line 28, but since it was felt that "made" did not apply to (1) and (2), he dropped the suggestion. Judge Estes moved that language read by Professor Cleary be adopted. There was a second to the motion, and there was unanimous approval to have subdivision (3) of subsection (b) read:

> "or (3) made, for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest."

Mr. Haywood moved for approval of subsection (b) as amended. Judge Van Pelt seconded. There was unanimous approval. Rule 5-03(b) as approved reads as follows:

> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) made, for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest."

(c) Who may claim the privilege.

Professor Cleary read the proposed subsection and gave the background of a few of the changes which were made therein. Discussion centered around the meaning of "successor" with relation to public offices held. Mr. Jenner questioned the usage of the word, "may", at the beginning of line 40 and said he felt that perhaps "must" should be used. However, Professor Cleary stated that the Committee had decided that the lawyer should not have to claim the privilege where because of personal circumstances it would cause a hardship. Dean Joiner moved that subsection (c) as amended be approved, and Judge Estes seconded the motion. There was unanimous approval and Rule 5-03(c) reads as follows:

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client, and his authority to do so is presumed in the absence of evidence to the contrary."

(d) Exceptions.

(1) Furtherance of crime or fraud.

Professor Cleary explained the background of this and subdivision, and read the text and comment thereto. There was an extensive discussion during which actual and hypothetical cases were presented wherein it was shown that the lawyer himself was guilty of furthering crime, and it was felt that perhaps language covering these types of cases should be put into this subdivision. However, further discussion led to the general agreement that the situations presented were covered under different rules. Mr. Haywood moved the adoption of subdivision (1). Dean Joiner seconded. Motion was carried unanimously and Rule 5-03(d)(1) as approved reads as follows:

"(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or"

(2) Claimants through deceased client.

Professor Cleary read the subdivision and gave its background. Judge Van Pelt moved its approval, and Judge Estes seconded. Dean Joiner suggested that the word,"a", in line 49 be substituted with "the same", and Judge Van Pelt accepted that amendment. Motion was favored unanimously, and Rule 5-03(d)(2) reads as follows:

> "(2) Claimants through deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or"

(3) Breach of duty by lawyer or client.

Professor Cleary read the text and his comment thereto. Mr. Jenner suggested that the second "by" in line 53 be stricken and the reporter agreed. Judge Sobeloff and Mr. Williams felt that the rule went too far. However, it was pointed out that rules of relevancy would govern the situations and that it was impossible to cover or even try to cover everything in rules of evidence. Dean Joiner suggested the following language: "As to a communication relevant to the breach by the lawyer or by the client of a duty arising out of the lawyer-client relationship."

Judge Weinstein read Uniform Rule 26(2)(c) which is as follows:

> "to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or".

Mr. Selvin moved that subdivision (3) be amended by use of the uniform language. Mr. Epton seconded. Motion was carried by vote of 11 to 1. [Chair ruled that no general motion for approval was needed.] Rule 5-03(d)(3) as approved reads as follows:

> "(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer, or".

(4) Document attested by lawyer.

Professor Cleary read the text and comment.

Judge Van Pelt moved for approval of subdivision (4) as submitted by the reporter. Mr. Spangenberg seconded the motion. There was unanimous approval and Rule 5-03(d)(4) reads as follows:

> "(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or".

(5) Joint Clients.

Professor Cleary read the text and gave its background.

There was a short discussion between Judge Weinstein and Professor Cleary as to what was covered by usage of the words, "in common", in this rule and what was covered under subdivision (3) of subsection (b). Judge Weinstein was satisfied

with the reporter's explanation and Mr. Epton moved for approval of subdivision (5) as submitted. Motion was seconded and it was carried by unanimous approval. Rule 5-03(d)(5) as approved reads:

> "(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients."

PROPOSED RULE OF EVIDENCE 5-04. PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Professor Cleary read the rule and his comments thereto.

(a) Definitions.

Mr. Epton moved approval of subsection (a) and Judge Sobeloff seconded. Mr. Spangenberg felt that the privilege should not be extended to all members of the patient's family. After discussion, Judge Estes moved that the rule be restricted by the exclusion of the patient's family members and Mr. Spangenberg seconded. Motion was lost by vote of 9 to 3.

Vote was taken on Mr. Epton's motion for approval, and it was carried unanimously. Rule 5-04(a) as approved reads:

> "(a) Definitions:
>
> (1) A 'patient' is a person who consults or is examined or interviewed by a psychotherapist for purposes of diagnosis or treatment of his mental or emotional condition.

"(2) A 'psychotherapist' is (i) a person authorized to practice medicine in any state or nation, who devotes a substantial portion of his time to the practice of psychiatry, or reasonably believed by the patient to be such, or (ii) a person licensed or certified as a psychologist under the laws of any state or nation, who devotes a substantial portion of his time to the practice of clinical psychology.

"(3) A communication is 'confidential' if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who participate in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family."

(b) General rule of privilege.

Professor Cleary read the text. Dean Joiner moved for approval of subsection (b) as submitted by the reporter. Mr. Epton seconded. Motion was unanimously carried. Rule 5-04(b) as approved reads:

"(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among himself, his psychotherapist, or persons who participate in his diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family."

(c) Who may claim the privilege.

Professor Cleary read the text. Dean Joiner moved the approval of the subsection as submitted by the reporter. Professor Green seconded and the motion was carried unanimously.

Rule 5-04(c) as approved reads as follows:

"(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary."

(d) Exceptions.

(1) Proceedings for hospitalization.

Professor Cleary read the proposed subdivision and gave the background. Mr. Selvin suggested that "As to relevant communication" be substituted with the words, "As to communications relevant to an issue". Professor Cleary said the change would be quite acceptable. Mr. Selvin questioned which word was the antecedent of the word "thereof" in line 40. The reporter agreed that it referred to hospitalization, and Mr. Jenner suggested the words, "of hospitalization", be used rather than "thereof". Dean Joiner moved that the last clause be stricken and the subdivision end with the word "illness" in line 38, but when the background of the submitted wording was given by Professor Cleary and there was no support for his motion, Dean Joiner withdrew it. Mr. Selvin moved for approval of the subsection with the proposed changes. Mr. Epton seconded. Motion was carried unanimously. Rule 5-04(d)(1) as approved reads:

"(1) Proceedings for hospitalization. As to communications relevant to an issue in proceedings to hospitalize the patient for mental illness, when the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; or".

(2) Examination by court order.

Professor Cleary read the text and gave the background. Judge Weinstein asked if it would be possible for the court to order otherwise at the time the examination is ordered, e.g., for the court to rule that the communications are privileged. Mr. Jenner suggested that the phrase, "Unless otherwise ordered by the court", be inserted at the beginning of the subdivision. After short discussion, Mr. Selvin moved that the language suggested by Mr. Jenner be added. Mr. Epton seconded. Several language suggestions were made, and it was decided that the Committee should vote on the matter as an issue of policy. Mr. Epton withdrew his second of Mr. Selvin's motion. Mr. Jenner stated that the issue of policy was that the wording of subdivision (2) should be such that it would incorporate the idea that the court could have the power in his order to make communications privileged. There was unanimous approval.

Judge Sobeloff moved that the sense of the last clause of subdivision (2), i.e., "but only with respect

to the particular purpose for which the examination is ordered;" be retained but that it be put into different language in a separate sentence. Judge Van Pelt seconded. Further discussion ensued and it was decided to leave the issue for the next morning's session.

[Meeting was adjourned on Thursday at 5:10 p.m. and was resumed on Friday at 8:35 a.m.]

Professor Cleary advised the Chairman that subsection (d) of proposed Rule 5-04 had been redrafted, but that there was more work to be done.

It was decided to not take up Rule 5-03 until Messrs. Williams and Spangenberg arrived.

PROPOSED RULE OF EVIDENCE 5-06. COMMUNICATIONS TO CLERGYMEN.

(a) Definitions.

Professor Cleary gave background of second draft of this rule. After short discussion, Mr. Haywood moved for approval of subsection (a). Rule 5-06(a) as unanimously approved reads:

"(a) Definitions. As used in this rule:

(1) A 'clergyman' is a minister, priest, rabbi, or other similar functionary of a religious organization, or reasonably believed to be such by the person consulting him.

(2) A communication is 'confidential' if made privately and not intended for further disclosure."

(b) General rule of privilege.

Professor Cleary read the subsection, and changed the words, "any other person", in line 10 to read "another". Dean Joiner felt that it was wrong to give the clergyman himself the privilege, and therefore, he moved that the last sentence of subsection (b) be stricken. There was a discussion centered around whether or not a priest would be allowed, either with or without the penitent's consent, to divulge what was said to him in the confessional. Dean Joiner felt that it was completely irrelevant what position any church took on the issue under discussion. Mr. Jenner read the comment to Rule 29 of the Uniform Rules of Evidence and also the text of Rule 29(2), which are as follow, respectively:

"Comment

"This rule permits either priest, broadly defined, or penitent to claim the privilege. While the privilege was not recognized under the common law, it has been sanctioned by statute in a majority of jurisdictions and on the ground of public policy has adequate basis for recognition. 8 Wigmore, Evidence (3rd ed.), Secs. 2394-2396. This rule follows American Law Institute Model Code of Evidence Rule 219. The privilege is intentionally limited to communications by communicants within the sanctity and under the necessity of their own disciplinary requirements. Any broader treatment would open the door to abuse and would clearly not be in the public interest."

> "(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent."

Professor Cleary read his comment on the original draft of the rule as follows:

> "If he desires disclosure to be made no reason against it is apparent and statutes commonly provide for waiver by the communicating party."

After a general discussion, Dean Joiner's motion was carried by vote of 10 to 2. [See approved text below.]

(c) Who may claim the privilege.

Professor Cleary read the text and said that, in view of the action just taken, the second sentence of the subsection was to be stricken, and the third sentence would read:"The clergyman may claim it on behalf of the person, and his authority so to do is presumed in the absence of evidence to the contrary." Judge Estes moved for the adoption of subsection (c) as modified. Motion was carried unanimously. Mr. Jenner then stated that subsections (b) and (c) had been approved to read as follows:

"(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

"(c) Who may claim the privilege. The privilege may be claimed by the person, his guardian or conservator, or his personal representative if he is deceased. The clergyman may claim it on behalf of the person, and his authority so to do is presumed in the absence of evidence to the contrary."

PROPOSED RULE OF EVIDENCE 5-04. PSYCHOTHERAPIST-PATIENT PRIVILEGE.

(d) Exceptions.

(1) Proceedings for hospitalization.

During a short discussion between the chairman and reporter it was decided that the sentences as submitted in the alternative second draft dated July 7, 1967, should be inverted. Judge Weinstein moved that the redraft be approved and Dean Joiner seconded. Motion was approved unanimously. Rule 5-04(d)(1) as approved reads:

"(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, when the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization."

(2) Examination by order of judge.

Mr. Berger asked why the language, "unless the judge orders that they are privileged for all purposes.", was necessary, and Professor Cleary replied that he was going to suggest that the

word, "otherwise", be used in lieu of the phrase, "that they are privileged for all purposes." There was no objection to that substitution. Professor Cleary also thought that after the word, "privileged", in line 9, the words, "under this rule", should be added. Judge Weinstein moved that subdivision (2) be adopted as proposed by the reporter. Dean Joiner seconded. Motion was carried unanimously, and Rule 5-04(d)(2) as approved reads as follows:

> "(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise."

(3) Condition put in issue by patient or successor.

Professor Cleary read the text. Mr. Spangenberg asked what was meant by "claims through the patient". Judge Weinstein asked if the word, "it", in line 15 could be changed to "the condition". Mr. Jenner inquired whether it should be "introduces the condition" or "relies upon the condition", and it was agreed that the wording should be "relies upon the condition". Mr. Selvin moved that lines 14 and 15 as submitted in alternative second draft be changed to read: "an issue of the mental or emotional condition of the patient in any proceeding in which he introduces the issue as an element of his". There were several language

change suggestions, and Mr. Selvin accepted "relies upon the condition" as a substitution for "introduces the issue". Motion was carried unanimously. Mr. Selvin then moved that line 18 be amended by the substitution of "relies upon the condition" for "introduces it". There was unanimous approval of the motion.

Judge Van Pelt asked whether or not the phrase "as a beneficiary of the patient" should be left in, and in the event that it was, should it not be broad enough to include all transactions. Judge Weinstein moved that the phrase, "claiming or defending through the patient or as a beneficiary of the patient",be stricken. Judge Van Pelt seconded. After a short discussion, motion was carried by vote of 13 to 1.

Dean Joiner moved that the caption of subdivision (3) be changed to read: "Condition put in issue by the patient or after his death." Mr. Jenner suggested that the caption could be simply "Condition put in issue.", and all were in agreement. Judge Estes moved that in lines 30 and 31 of subdivision (c), the following words be deleted: "or by the personal representative of a deceased patient." Dean Joiner seconded. During a short discussion, the prevalent viewpoint was that the reputation of a deceased should not be open to criticism. Judge Estes' motion was lost by vote of 6 to 5.

Dean Joiner moved that subdivision (3) be approved as redrafted. There was unanimous approval. Rule 5-04(d)(3) as approved reads as follows:

> "(3) Condition put in issue. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense."

PROPOSED RULE OF EVIDENCE 5-05. HUSBAND-WIFE PRIVILEGE.

Professor Cleary read the text and his comment. Judge Weinstein moved that the word, "action", in line 3 of subsection (a) be changed to "proceeding". Mr. Raichle seconded. There was unanimous approval. Judge Weinstein then moved for approval of subsection (a), and Dean Joiner seconded. Motion was carried by vote of 13 to 1.

Judge Weinstein moved that the word, "actions", in line 6 of subsection (b) be changed to "proceedings", and Judge Estes seconded. There was unanimous approval. Judge Weinstein then moved for approval of subsection (b), and Dean Joiner seconded. Motion was carried unanimously. Rule 5-05 as approved reads as follows:

> "(a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

"(b) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage."

PROPOSED RULE OF EVIDENCE 5-07. POLITICAL VOTE.

Mr. Spangenberg moved for approval of the rule. Judge Estes seconded. There was unanimous approval and Rule 5-07 reads as follows:

"Rule 5-07. Political vote. Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally."

PROPOSED RULE OF EVIDENCE 5-08. TRADE SECRETS AND SIMILAR CONFIDENTIAL MATTERS.

Professor Cleary read the text and his comment thereto. Dean Joiner moved that the rule be stricken. Judge Van Pelt seconded. Mr. Jenner pointed out that Rule 26 of the Federal Rules of Civil Procedure does not cover proposed Evidence Rule 5-08; FRCP Rule 26 deals with discovery and Proposed Evidence Rule 5-08 deals with admissibility. After a very short discussion, Dean Joiner's motion was lost by a vote of 8 to 5.

Mr. Spangenberg moved that the language, "or other matters of similar confidential nature", be stricken from lines 4 and 5. Mr. Berger seconded. Judge Sobeloff asked

what was permitted by the language that Mr. Spangenberg did not want permitted. Mr. Spangenberg replied that he felt that "trade secret" was broad enough as generally interpreted. After considerable discussion, Dean Joiner modified Mr. Spangenberg's motion so that it was to strike the words, "or other matters of similar confidential nature", from lines 4 and 5 and to insert, after the word, "disclosure", in line 7, the following language: "of a trade secret or other matter of similar confidential nature". Motion was carried unanimously.

Dean Joiner moved that Rule 5-08 be approved as amended. Having been duly seconded, the motion was carried unanimously. Rule 5-08 as approved reads as follows:

> "Rule 5-08. Trade secrets and similar confidential matters.
>
> A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure of a trade secret or other matter of similar confidential nature is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require."

PROPOSED RULE OF EVIDENCE 5-09. SECRET OF STATE.

Professor Cleary read the text and his comment thereto.

(a) Definition.

Mr. Epton moved approval of the subsection. Dean Joiner seconded. There was unanimous approval, and Rule 5-09(a) reads:

> "(a) Definition. A 'secret of state' is information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United States."

(b) General rule of privilege.

A discussion on the meaning of the term, "in camera", was opened. However, since it pertained to subsection (c), Mr. Jenner asked the Committee for action on subsection (b) before further discussion.

There was a lengthy discussion on the different slants given to just what is a state secret. Judge Sobeloff moved that "sufficient" be added before the word, "showing", in line 7 of subsection (b). Mr. Haywood seconded. Motion was carried by vote of 8 to 3.

Judge Weinstein proposed the following as a substitution for line 7 of subsection (b): "When the judge finds that the evidence may disclose a secret of state." Motion was lost for want of a second. Judge Estes moved that line 7 read: "upon a sufficient showing of danger that the evidence will disclose a secret of state." Mr. Epton seconded. Mr. Spangenberg moved

to amend Judge Estes' motion by having line 7 read: "upon a showing of substantial danger that the evidence will disclose a secret of state." Mr. Raichle seconded. Mr. Spangenberg's motion was carried by a vote of 8 to 3. Mr. Williams moved to amend line 7 so that it would read: "upon a showing that the evidence will disclose a secret of state." Judge Estes seconded. Motion was lost by vote of 6 to 7. Dean Joiner moved that subsection (b) be approved. Motion was carried by vote of 12 to 1. Rule 5-09(b) as approved reads as follows:

> "(b) General rule of privilege. The Government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of substantial danger that the evidence will disclose a secret of state."

(c) Procedure.

Professor Cleary read the text.

Judge Weinstein moved that the language beginning with the word, "to", in line 12 and running through the word, "be", in line 14 be stricken and that the following be inserted: a period after the word, "statement", in line 12 and then this language - "The judge may proceed ex parte or in camera. The judge may order evidence" - and then the language be picked up with the word, "sealed", in line 14. Dean Joiner seconded. There was general discussion on the meaning of "ex parte" and "in camera". Mr. Jenner stated that the issues to be decided

were whether (1) the judge could consider the material with one side present and not the other; (2) he may consider it only in camera with no parties present; or (3) there be some combination. After a short general discussion, Judge Sobeloff moved that the Committee adopt the general policy that the determination of the issue raised by the statement may be done in camera - not in open court - but with counsel for both sides present. In other words, it may be done in chambers but not ex parte. The motion was seconded, and it was carried by a vote of 7 to 6.

[Lunch from 1:07 to 2:15 p.m.]

Mr. Jenner pointed out that what the Committee was faced with are the following: the completion of the first run through of hearsay and some additional materials; review of the Judicial Code and Bankruptcy, Civil, and other rules; going through the second stage material; completing revision of first stage material and considering that material before the third round is reached; third round will consist of finalized second round materials, and preparation of comments to accompany rules when they go to the country.

As to dates for future meetings, it was decided that they would be held on October 9, 10, and 11, 1967 (Monday, Tuesday, and Wednesday - with night sessions on the 9th & 10th) and on December 14, 15, and 16, 1967 (Thursday, Friday, and all day Saturday.)

Judge Weinstein moved that subsection (c) be ended with the word, "statement", in line 12. However, Mr. Jenner pointed out that to do that would not be in accordance with the motion carried with regard to the determination of the issue, and Judge Weinstein withdrew his motion. He then suggested that the first two sentences be retained, and that a third sentence, which would read: "The issue may be tried in chambers.", be added. Judge Estes suggested that the subsection be ended at line 11 with the word, "concerns". Judge Weinstein stated that the sentence, "The required showing may be made in whole or in part in the form of a written statements.", gave what amounts to a hearsay exception to the privilege. After a short discussion concerning hearsay rules, Mr. Berger asked why the Committee had to go beyond the first sentence of the subsection (c). Judge Weinstein moved that the first sentence be amended to read: "The privilege may be claimed only by communication from the chief officer of the department of government administering the subject matter which the secret concerns.", and that the rest of the proposed subsection be deleted. Judge Sobeloff did not like that idea, because he said that it did not indicate what the judge must do. Judge Weinstein withdrew his motion. Mr. Jenner suggested that Professor Cleary and Judge Weinstein be assigned the task of returning at the opening of Saturday's session with a redraft of subsection (c) which would carry into effect the policy adopted by the Committee, i.e., that the determination

of the issue may be in chambers but, if so, that it not be ex parte - that if the judge considers the materials in chambers, counsel for both parties must be present.

Professor Cleary suggested that line 12 be ended with the word, "statement", in the proposed draft, and that the following sentence be added: "The judge may hear the matter in chambers but all parties are entitled to inspect the claim and showing and to be heard thereon." Judge Weinstein moved that Professor Cleary's language be approved, and Mr. Williams seconded. Mr. Spangenberg thought that the word, "parties", should be changed to "counsel", since that is what is really meant. This amendment was accepted, and the motion was carried by vote of 10 to 4.

Mr. Williams moved that "affidavit" be substituted for "written statement" in line 12. Mr. Erdahl moved that the words, "certified statement", be substituted for "written statement under oath." Mr. Erdahl's motion was lost for want of a second. Mr. Williams' motion was lost by vote of 8 to 6. Mr. Williams then moved that as a matter of policy something to this effect be inserted into the rule: "The judge may take such protective measures as the interests of the government and the furtherance of justice may require." Dean Joiner seconded. Motion was carried unanimously, and the language was adopted as the last sentence of the subsection. Mr. Berger moved for approval of subsection (c) as revised. Judge Estes seconded, and motion was carried by majority vote.

Rule 5-09(c) as approved reads as follows:

> "(c) Procedure. The privilege may be claimed only by the chief officer of the department of government administering the subject matter which the secret concerns. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers but all counsel are entitled to inspect the claim and showing and to be heard thereon. The judge may take such protective measures as the interests of the Government and the furtherance of justice may require."

(d) Notice to Government.

Professor Cleary read the text. Mr. Raichle moved that subsection (d) be stricken. Judge Sobeloff seconded. However, after a short discussion during which it was shown that there were cases in which the Government was not a party, but where secrets of state were involved, Mr. Raichle withdrew his motion. Mr. Haywood moved for approval of subsection (d) as proposed, and Mr. Spangenberg seconded. Motion was carried unanimously. Rule 5-09(d) as approved is as follows:

> "(d) Notice to Government. If the circumstances of the case indicate a substantial possibility that a claim of privilege for a secret of state would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege."

(e) Effect of sustaining claim.

Professor Cleary read the text. There was feeling among the members that lines 13 and 14 should not be in this rule, and several cases were presented to back this. Mr. Williams moved that the words following the word, "which", in line 13 , and the whole of line 14 be deleted and that the following be used in lieu thereof: "the evidence is relevant." Mr. Berger seconded. Professor Cleary felt that that would be putting the Government at the mercy of every litigant who wanted to come and insert a claim against the Government. It would require the Government to produce material privileged under this rule in order to defend. During the discussion, Mr. Jenner suggested that the subsection be ended with the word, "require", in line 11. Judge Sobeloff remarked that that would safeguard against the fear that the Government would be put at the mercy of the litigant, and that it would also safeguard against the opposite danger, i.e., that the litigant would be put at the mercy of the Government. Judge Weinstein moved that the subsection be ended with the word, "require", in line 11. Mr. Berger seconded. It was brought to the attention of the chairman that there was a motion made prior to Judge Weinstein's. Vote was taken on Mr. Williams' earlier motion to delete all

language following the word, "which", in line 13 and substituting the words, "the evidence is relevant". Motion was carried by vote of 13 to 1. Judge Weinstein then moved that the subsection be ended with the word, "require", in line 11. Judge Estes seconded. Motion was lost by vote of 11 to 3.

Dean Joiner moved that subsection (e) as revised be approved. Mr. Selvin asked what could be done in a case where the Government is not a party to the action but the privilege is claimed and upheld. In a slander suit between two parties, the Government interposes. Judge Sobeloff seconded Dean Joiner's motion. It was carried unanimously. Rule 5-09(e) as approved reads as follows:

> "(e) Effect of sustaining claim. If a claim of privilege for a secret of state is sustained in a proceeding to which the Government is a party and it appears that the opposite party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, such as striking the testimony of a witness, declaring a mistrial, or finding against the Government upon an issue as to which the evidence is relevant."

PROPOSED RULE OF EVIDENCE 5-10. IDENTITY OF INFORMER.

Professor Cleary read the second drft of the rule and the alternative draft of subsection (c) and his comments thereto.

(a) Rule of privilege.

Mr. Haywood moved for the adoption of subsection (a). Dean Joiner seconded. Motion was carried by a vote of 8 to 5, and Rule 5-10(a) as approved reads:

> "(a) Rule of privilege. The Government or a State or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information purporting to reveal the commission of a crime."

(b) Who may claim.

Professor Cleary read the text. Mr. Erdahl moved for the adoption of the subsection. Mr. Berger seconded. Motion was carried by vote of 8 to 5. Rule 5-10(b) as approved reads as follows:

> "(b) Who may claim. The privilege may be claimed by an appropriate representative of the Government, regardless of whether the information was furnished to an officer of the Government or of a State or subdivision thereof. Unless the Government objects, the privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof."

(c) Exceptions. (Alternative second draft).

Mr. Epton moved that the first sentence be approved. Judge Estes seconded. Motion was carried by vote of 11 to 2.

After a discussion, which centered around arrests being made without probable cause and the identity of informers being withheld, Mr. Williams moved that subsection (d) as proposed in the second draft be substituted for subdivisions (2) and (3) of subsection (c) as proposed in the alternative second draft. Judge Weinstein seconded. Professor Cleary gave the background of the second draft of subsection (d). Mr. Williams said that as long as there was going to be a consequence attached to the failure of the Government to disclose the identity of the informer who has information on guilt or innocence and the validity of such, there should be attached a consequence to the failure of the Government to disclose the identity of an informer, when ordered, who has information on the validity of the search. Several aspects of the Roviaro, Rugendorf, and Van Tresca? cases were presented. Mr. Selvin asked if the reporter's intention in subsections (c) and (d) of the second draft and the alternative second draft of subsection (c) was that the identity of the informer be disclosed only to the judge in in camera proceedings. He pointed out that it would be an unenviable position to have to decide that it would be much more dangerous to the public welfare to let the parties in on the name of the stool pigeon than it is to let them in on the secrets of the atomic bomb.

Dean Joiner asked the reporter what he thought was accomplished by subdivision (3). Professor Cleary replied that his feeling was that it was a substantial gain to the accused. Mr. Williams said he did not understand what the consequence was intended to be if the Government does not give the slip of paper with the informer's name on it to the judge in camera. Professor Cleary said he felt that it would be entirely consistent to add a sentence which says in effect, "If the Government elects not to disclose the informants identity under these circumstances, then the privilege should be suppressed." Judge Sobeloff asked what happened when the Government does disclose the identity of the informer to the judge, but the judge decides to keep it from the defense counsel. During the discussion, which followed, Judge Estes said that he was very much in favor of subdivision (2) but not in favor of subdivision (3). Judge Weinstein suggested that subdivision (2) in the alternative second draft be left as submitted and then the following language be used: "If information from an informer is relied upon to establish the legality of the means by which evidence was obtained, and the circumstances indicate a reasonable probability that the informant can give testimony necessary for a fair determination of an issue of the legality of the method of obtaining the evidence as affecting its admissibility, the judge shall order the Government to show cause why the proceeding should not be dismissed or the issue found against the Government."

Upon motion by the Government, the judge may permit the showing to be made in whole or in part in the form of a written statement to be inspected by the judge in camera or make such other order as justice may require. In making its decision, the court may consider whether the evidence was acquired after issuance of a warrant. If the showing is made in camera, the entire text of the Government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of any appeal." Mr. Jenner stated that this proposal would be taken up at the beginning of Saturday's session.

[Meeting was adjourned at 4:57 p.m. on Friday and was resumed at 8:33 a.m. on Saturday.]

PROPOSED RULE OF EVIDENCE 5-11. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE.

Professor Cleary read the rule and his comment thereto. Dean Joiner said he assumed that the idea of this rule is that when a husband, charged with a crime, put his wife on the stand to testify in his favor, that this would be a waiver on cross-examination so far as one being able to ask the wife questions against the husband. He said that if this were the rule upon which it were being relied to accomplish waiver in some way, then proposed rule 5-11 did not do that. Professor Cleary replied that 5-11 dealt only with the confidential communication type of privilege. After discussion, Dean Joiner moved that the reporter be requested to draft a part of Rule 5-11 or to add a section to the husband-wife privilege that would say in effect that taking the stand is a waiver of the privilege. After short discussion, Dean Joiner restated his motion to be that it be the policy of the Committee, to be implemented by appropriate rule drafting, that the privilege of an accused not to have his wife testify is waived generally if the accused calls his wife as a witness in his behalf. Judge Estes seconded. Following discussion, Dean Joiner's motion was lost by vote of 8 to 5.

Mr. Williams moved that it be the policy of the Committee, to be implemented by appropriate rule drafting, that the privilege of an accused not to have his wife testify is waived with respect to the count of the indictment to which the wife gives testimony. Mr. Berger seconded. Discussion centered around multiple count cases, and certain aspects of the recent High's Dairy robbery were presented. Mr. Williams' motion was lost by vote of 9 to 4.

Judge Estes moved for the adoption of proposed Rule 5-11. Dean Joiner seconded. Mr. Jenner suggested that the reporter strike the word, "as", in line 3. Mr. Selvin moved that it be a policy of the Committee that the rule on waiver excludes having the effect of a waiver a disclosure that is made because it is necessary or desirable to effect the purposes of a particular relationship to which the privilege may be applied. Mr. Berger seconded. Motion was lost by vote of 8 to 4. After a short discussion, vote was taken on Judge Estes' motion, and the motion was carried unanimously. Rule 5-11 as approved reads as follows:

"Rule 5-11. Waiver of privilege by voluntary disclosure. A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if he or his predecessor holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter. This rule does not apply if the disclosure is itself a privileged communication."

PROPOSED RULE OF EVIDENCE 5-10. IDENTITY OF INFORMER.

(c) Exceptions.

The Committee picked up subdivision (3) which had been redrafted by Judge Weinstein and Professor Cleary. For purposes of discussion, the drafts were numbered as: (1) Judge Weinstein's Alternate proposal for Rule 5-10(c)(3) dated 7-8-67; (2) Judge Weinstein's proposal for Rule 5-10(c)(3) dated 7-8-67; and (3) the reporter's alternative second draft dated 7-7-67. Judge Weinstein moved for approval of No. 1. Mr. Jenner stated that the issue posed was whether or not the rest of the Committee agreed with Judge Weinstein that the rules does not foreclose or dampen in any event the production of the informant when his identity is disclosed, and whether they thought the rule needed an affirmative provision. During the course of conversation, Judge Weinstein said that as he read the California Code, in order for the Government not to disclose, the judge must be satisfied that the informant is reliable. He pointed out that this is just what lines 3 and 4 of his alternate proposal provided, and he believed that it was the correct approach. Mr. Spangenberg felt that the protection of the informant was a very important consideration. For that reason, he was for the proposal that gave the judge the broadest discretion. The provisions of California Code §1042(a) and (c) and the decisions in the Priestly case were presented during the discussion. A vote was taken on Judge Weinstein's motion

to approve his alternate proposal. Motion was lost by vote of 8 to 7. Judge Van Pelt moved for approval of Judge Weinstein's proposal No. 2. Mr. Borger suggested an amendment to the motion. This was to substitute the word, "shall", for the word, "may", in line 4 of proposal No. 2. The chairman stated that the issue raised by the proposed amendment was the only question upon which a vote was being taken at the present time. Motion was lost by count of 8 to 5. Judge Van Pelt again moved to approve Judge Weinstein's proposal No. 2. Motion was duly seconded and was carried by vote of 7 to 6. [Judge Estes did not vote.]

Mr. Jenner asked the Committee if there was an ambiguity of the character which had been discussed in line 6 that the disclosure be made in camera. He asked if it meant that the court may make it ex parte as well. Dean Joiner moved that the words, "in camera", be substituted with the words, "in private". There was no second, as it was felt that this was not the solution. Mr. Spangenberg moved that in line 6, the words, "in camera", be substituted with the words, "in private without the presence of counsel or party". Judge Van Pelt moved that in lieu of the words, "the showing", there be substituted the words, "the disclosure of the identity of the informant". Mr. Jenner suggested that rather than attempting to change the language, the Committee should vote on the policy only - it being that if the judge receives the identity of the informant in the presence of any counsel, then all counsel have a right to be present. Policy was adopted by vote of 7 to 5.

By this action, the Committee adopted Rule 5-10(c)(3) which reads as follows:

> "If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informant reasonably believed to be reliable, the judge may require the identity of the informant to be disclosed. In making his decision, the judge may consider whether the evidence was acquired after issuance of a warrant. The judge may permit the disclosure to be made in camera or may make such other order as justice requires. If the disclosure of the identity of the informant is made in camera, the record shall be sealed and preserved to be made available to the appellate court in the event of an appeal", and an additional sentence to be added to state the policy that if any counsel is allowed to be present at any stage of the proceeding, then all counsel are to be permitted to be present.

Judge Weinstein moved that subdivision (2) of subsection (c) be approved as submitted by the reporter in alternative second draft, lines 5 through 11. Motion was carried by majority vote. Rule 5-10(c)(2) as approved reads as follows:

> "If the Government elects not to disclose the identity of an informer and the circumstances indicate a reasonable probability that the informer can give testimony necessary for a fair determination of the issue of guilt or innocence, the judge shall on motion of the accused dismiss the proceeding, and he may do so on his own motion."

Mr. Jenner, at this point, read the entire subsection as it had been approved. Rule 5-10(c) is as follows:

> "(c) Exceptions. (1) No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed by the holder of the privilege or by the informer's own action, or if the informer appears as a witness. (2) If the Government elects not to disclose the identity of an informer and the circumstances indicate a reasonable probability that the informer can give testimony necessary for a fair determination of the issue of guilt or innocence, the judge shall on motion of the accused dismiss the proceeding, and he may do so on his own motion. (3) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained, and the judge is not satisfied that the information was received from an informant reasonably believed to be reliable, the judge may require the identity of the informant to be disclosed. In making his decision, the judge may consider whether the evidence was acquired after issuance of a warrant. The judge may permit the disclosure to be made in camera or may make such other order as justice requires. If the disclosure of the identity of the informant is made in camera, the record shall be sealed and preserved to be made available to the appellate court in the event of an appeal.", and the text shall be further modified by the reporter to include a provision that if the judge allows any counsel to be present during the determination, then all counsel are to be permitted to be present.

Professor Cleary proposed the following sentence to cover the provision: "All counsel shall be permitted to be present at every stage at which any counsel is permitted to be present." Professor Green seconded. Motion was carried by vote of 12 to 1. The last sentence of Rule 5-10(c)(3) as approved reads:

> "All counsel shall be permitted to be present at every stage at which any counsel is permitted to be present."

PROPOSED RULE OF EVIDENCE 5-12. INADMISSIBILITY OF PRIVILEGED MATTER DISCLOSED UNDER COMPULSION.

Professor Cleary read the text and comment.

Judge Weinstein moved approval. It was duly seconded and motion was carried unanimously. Rule 5-12 as approved reads as follows:

"Rule 5-12. Inadmissibility of privileged matter disclosed under compulsion. Evidence of a statement or other disclosure of privileged matter is inadmissible against the holder of the privilege if the disclosure was compelled (a) erroneously or (b) without opportunity to claim the privilege."

PROPOSED RULE OF EVIDENCE 5-13. COMMENT UPON OR INFERENCE FROM EXERCISE OF PRIVILEGE; INSTRUCTION.

Professor Cleary read the text and comment thereto. Judge Weinstein moved for adoption of the rule, and Mr. Epton seconded. Motion was carried unanimously, and Rule 5-13 as adopted reads as follows:

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

"(a) Comment or inference not permitted. The exercise of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

"(b) Claiming privilege outside presence of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege outside the presence of the jury.

"(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

Agenda Item No. 2 - Memorandum No. 17

ARTICLE II. JUDICIAL NOTICE.

Professor Cleary read the complete text. Mr. Jenner asked the reporter if he posed for initial action on the part of the Committee his recommendation one that the procedural treatment in Rules 44 and 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure remain respectively as civil and criminal rules and the primarily procedural not be incorporated in the draft of the Committee. After hearing Professor Cleary's remarks, Mr. Jenner summarized the reporter's recommendation as being that the subject matter continue to be treated as it is in the civil and criminal rules with a recommendation on the part of the Evidence Committee to both of these advisory committees or to the standing Committee, whatever is the proper procedure, that the pertinent civil and criminal rules be expanded so as to embrace sister state law issued as well as administrative and ordnance. There was an assumed second to the recommendation as a matter of policy, and there was unanimous approval of that recommendation.

PROPOSED RULE OF EVIDENCE 2-01. JUDICIAL NOTICE OF ADJUDICATIVE FACTS.

Professor Cleary read the text. Professor Green moved for adoption of the rule, but it was decided to take it in parts. It was agreed that the phrase, "in the particular case", in line 2 was to be deleted. Because there was a feeling that the language in line 4 was rather confusing, the reporter suggested that it be changed to read: "The facts must not be subject to reasonable". Judge Estes moved for adoption of subsection (a). Mr. Selvin suggested the use of parenthetical enumeration of the reasons after the word, "because", and this was acceptable. Mr. Jenner announced that it had been moved and seconded that lines 1 through 8, as modified, be approved. Motion was carried unanimously. However, the chairman had neglected to call for discussion before the vote was taken, and Professor Green suggested that, instead of the word, "universally", the word, "generally", be used. This was accepted without a separate vote. Rule 2-01 through subsection (a) as approved by the Committee reads as follows:

"Rule 2-01. Judicial notice of adjudicative facts. Judicial notice of facts in issue or facts from which they may be inferred is governed by the provisions of this rule: (a) Kinds of facts. The facts must not be subject to reasonable dispute because: (1) generally known; (2) generally known within the territorial jurisdiction of the trial court, or (3) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

(b) When taking notice discretionary.

Professor Cleary read the text. Judge Weinstein moved adoption and Judge Sobeleff seconded. Motion was carried unanimously, and Rule 2-01(b) as approved reads as follows:

> "(b) When taking notice discretionary. In all cases a judge or court has discretion to take judicial notice, whether requested or not."

(c) When taking notice mandatory.

Professor Cleary read the text. It was agreed that the word, "any", in line 13 should be deleted. However, after a short discussion, Mr. Jenner suggested that the clauses of the first sentence be inverted, and that the word,"any", be substituted with the word, "the". There was no objection to either suggestion. Judge Weinstein moved that the second sentence be stricken. Mr. Epton seconded. There was no dissent. Judge Weinstein moved that subsection (c) be adopted as amended. Mr. Epton seconded. There was unanimous approval, and Rule 2-01(c) as approved reads:

> "(c) When taking notice mandatory. A judge or court shall take judicial notice, if requested by a party and supplied with the necessary information."

(d) Opportunity to be heard.

Judge Weinstein moved that the phrase, "adversely affected thereby", in line 15 be stricken. It was generally agreed that any party should be entitled to be heard, and the phrase was stricken. After a short discussion, Judge Weinstein moved

for adoption of subsection (d). There was unanimous approval, and Rule 2-01(d) as approved reads as follows:

> "(d) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed."

(e) Time of taking notice.

Professor Cleary read the text. Judge Weinstein moved for the adoption of subsection (e). It was seconded, and motion was carried by unanimous approval. Rule 2-01(e) as approved reads as follows:

> "(e) Time of taking notice. Judicial notice may be taken at any stage of the proceedings."

(f) Instructing jury.

Professor Cleary read the text and added the following words to his proposed draft: "which would otherwise be for their determination". There were a few language change suggestions. Mr. Jenner read the reporter's comment regarding this subsection. It was agreed that the question of policy raised by this subsection should be held over until the next meeting, since quite a few of the Committee members had left for the day. Mr. Jenner announced that the first item to be taken up at the next meeting would be subsection (f) of proposed Rule 2-01.

Meeting was adjourned at 12:58 p.m.