MEETING OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

The second meeting of the Advisory Committee on Rules of Evidence was held in the Ground Floor Conference Room of the Supreme Court Building on October 14, 15 and 16, 1965. The meeting was convened at 10:00 a.m. All members were present except Mr. Frank G. Raichle, who was unavoidably absent. Dean Joiner was unable to attend the first day of the meeting and Professor Weinstein was unable to attend on the second day.

The members attending were:

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

Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, and William E. Foley, Secretary to the Rules Committees, were also in attendance.

The Chief Justice and Mr. Justice Clark attended the meeting briefly at the close of the sessions on Saturday at noon. The Chief Justice addressed the members stating that he appreciated their willingness to undertake the very enormous task before them and he feels certain the Committee will make a great contribution in this field.

The meeting was called to order by the Chairman, Mr. Jenner, who stated that three of the less controversial topics had been selected for discussion at the meeting. These were Authentication, Content of Writings, and Opinions and Expert Testimony. Memoranda on these subjects, as well as proposed drafts for rules, had been prepared by Professor Cleary, the Reporter, and distributed to the members in advance of the meeting. The Chairman called on Professor Cleary to discuss the agenda and order of business.

Professor Cleary stated that in preparing the proposed rules he had consulted the Uniform Rules of Evidence, drafted by the National Conference

of Commissioners on Uniform State Laws, and the California Code. The numbering system which he used was explained and Professor Cleary stated that it is a temporary working arrangement and should not be considered final. He further stated that while he had been following the California Code and the Uniform Rules, there were subjects which were not covered in the Code and he hoped the members would make a thorough reading of the Code to determine topics which were not covered but which should be covered in the study of the Rules of Evidence. He stated that he felt certain requirements were necessary for satisfactory drafting: (1) treatment of definitions -- definitions should be avoided whenever possible; and (2) words should be used in an ordinary meaning wherever possible -- contribe meanings to words should be avoided. Definitions used should be placed in the material to which they relate; rules should be drafted in the present tenses; and related topics should be kept together. He stated his object is to draft rules to be as usable and accessible as possible.

Memorandum No. 2. Authentication

The Reporter started the discussion by reviewing the text of the preliminary discussion in this memorandum. He stated that Article IX, following the pattern of the Uniform Rules, deals solely with the subject of Authentication. He felt it important for the Committee to keep in mind the fact that a document satisfactorily authenticated does not mean it is necessarily admissible in evidence. He hoped that "authentication" would not be thought of as the equivalent to "admissible in evidence." Authentication is a broader topic than it is usually regarded as being. Frequently it is thought of as documents (the Uniform Rules deal with it as if it were documents only and the California Code deals with it in the same way), but it should be a broader problem -- one of relevancy. He further stated that in preparing the drafts he had dealt with authentication in the broad sense and not as purely a documentary problem.

Discussion was held on the departure from the present rule in that authentication should be used in the broad sense and the effects of departing

from the present rule.

Judge Estes moved that the Reporter be instructed that the Committee wishes to depart from the procedure which has been traditional up to the present date, in order that authentication may include not only documents but matters and other things of physical nature.

Professor Weinstein then asked for a point of clarification as to whether "things other than documents" include the identification of the human voice on the telephone. Mr. Williams suggested that there may be confusion by virtue of the fact that authentication and relevancy may be overlapping when there is a situation where the issue is whether the document offered is what it purports to be or what the proponent claims it to be. He stated that he thought it would be a radical departure from the present rule to include authentication of a voice. Mr. Berger did not see what could be accomplished by this departure. Mr. Selvin had no objection to the rule going beyond documents -- that it should go as far as the necessity -- the

necessity being whatever is necessary to prove that something is what it is claimed to be. Judge Van Pelt felt that the term "foundation" was somewhat synonymous to the meaning of authentication in the broad sense but some of the members held the viewpoint that the term "foundation" would also need clarification. Mr. Epton thought the matter of voice was what is usually thought of as "foundation," but that he would support a motion that authentication go beyond the original concept of documents. He personally felt that it should be limited to objects. Professor Weinstein did not feel the Committee should adopt a resolution of this type at this advance stage as he could not see, from the conversation, any serious divergence of views of the basic policy. He felt that the members were agreeing that the basic propositions were that anything relevant is admissible unless there is good reason to keep it out and that relevancy has beenddefined in the Uniform Rules as anything which has any probative force in tending to prove the material proposition in the case. He felt there was agreement that every piece of evidence has to be sufficiently connected with the material proposition so

that a reasonable jury could find that it has no probative force. With respect to the subject of documents, he felt that the rule of authentication is designed to take care of the matter.

Professor Weinstein offered an amendment to Judge Estes' motion that the Committee approve the Reporter's suggestion that the rule will cover the foundation for admission of specific types of evidence in addition to writings, such as telephoneecalls, tapes, and other items. Judge Estes accepted the amendment to his motion. Judge Sobeloff called for a point of clarification as to whether the rule will cover not only documents but any other things introduced -- the proper foundation, identification of voices, etc. The Chair stated that this was the understanding. Judge Estes restated his motion as follows:

> That the Reporter be instructed that the Committee wishes to depart from the procedure which has been traditional up to the present date in order that authenticity may include not only documents but matters and other things of physical nature.

The motion was carried unanimously.

Rule 9-04. Effect of Authentication [To be renumbered 9-01]

The Reporter stated that as a result of the discussion, he would like to change the order of his proposed rules -- making presently numbered Rule 9-04, Effect of Authentication, Rule 9-01. He also suggested that the second sentence reading as follows be deleted: "If the opposite party introduces evidence of non-authenticity, the issue of authenticity is for the trier of fact." The members agreed and Mr. Haywood moved that the second sentence be deleted. The motion carried. It was further agreed that Rule 9-04 be changed to Rule 9-01 and that the terminology be left to the Reporter. Professor Cleary stated that according to the suggestions from the floor, the rule would read similar to the following:

> "Upon the introduction of evidence sufficient to support a finding that the matter in question, is, or at a relevant time in the past was, what its proponent claims it to be the requirement of authentication or identification as a condition precedent to admissibility in evidence is satisfied."

Mr. Jenner asked Professor Cleary to send copies of the revisions of the drafts to the Committee members, and that any comments from the members should be distributed to every member. It was pointed out that Mr. Foley would be glad to have the comments duplicated and distributed if the members will send the original to him.

Rule 9-03. Evidence of Authenticity [To be renumbered 9-02]

The Reporter suggested the first sentence be stricken in lieu of prior action and the opening paragraph will read as follows:

> By way of illustration and not by way of limitation, the following methods of authentication may be used, as may be appropriate:

The Committee approved deletion of the first sentence.

Subdivision (a)

It was decided that the language in subdivision (a) is too restrictive and the Reporter stated that it may be better to drop out subdivision (a) and pick it up again at the end of the illustrations after subdivision (j). After discussion, it was the consensus of the Committee that this be deleted.

Subdivision (b)

Mr. Spangenberg thought the phrase "An admission by the party" might be misconstrued as being tantamount to a scope of the profession where it is known that authenticity of things is very often proved by silence. Professor Weinstein thought that extra judicial admissions is actually what is meant. He felt the whole hearsay rule of admission was being incorporated. Mr. Selvin suggested that subdivision (b), as well as the other subdivisions, be eliminated because he did not like illustrations in the statute of the rule -- his reason being that if any of these things consist of testimony or testimonial utterances, or documents of any kind that tend to prove or disprove authenticity, then they are relevant and are admissible unless something in the rules say they are not. Professor Weinstein stated that there are some situations, and he thought perhaps these illustrations were designed to meet these, where the common law rule has developed -- mostly where there is an uncertainty. Mr. Berger suggested that it would be better to put illustrative material in a

comment. He thought the comment could specify some of the ways in which the Committee could authoritatively declare to accomplish the authentication or identification. The Reporter felt that two matters, and perhaps more, would have to be dealt with: (1) treatment of specimen signatures and (2) ancient documents rule. The other matters are a necessity of restating the common law. Mr. Jenner stated he thought the Committee had reached a point of eliminating specificity in Rule 9-03 with the possible exception of the ancient document rule, which is subdivision (i), and specimens, which is subdivision (d). A suggestion was made that these rules follow the pattern of the Federal Rules of Civil Procedure and Professor Cleary stated he was disturbed by the suggestion. He did not think that similarity in itself is an objection, but he did think there is little relation to the problems of the Federal Rules of Civil Procedure. The problems that their Committee dealt with were different from the problems of this Committee. He stated that the Committee must realize that it is confronted with a very positive choice.

A reservoir of law is needed to decide these questions. In the area of authentication the bar and judiciary are going to need standards as to what does and does not satisfy the requirements, and he wondered what should be done for the reservoir. Should the Committee attempt to supply that demand leading up to X point or refer the reader back to Wigmore? Judge Sobeloff suggested that in order to get a better perspective the matter could better be settled after going through the specific illustrations or after consideration of the other rules. Mr. Jenner suggested that the words "of authenticity" be eliminated in the draft. There was no opposition to this suggestion. It was the consensus of the Committee that consideration of Subdivision (b) be left for future consideration.

Subdivision (c)

Discussion was held as to whether to attempt to preserve any line of demarkation between the lay and expert handwriting witness. After considerable discussion on the floor, Mr. Jenner stated the issue as he saw it was one of whether the Reporter should attempt to distinguish between

the lay witness and the expert witness and, if so, on what basis. Judge Van Pelt inquired whether there was anyone who felt the non-expert should be excluded from testifying. The Chair stated there had been no comments to indicate that the non-expert should be excluded.

It was the consensus that if the Committee retains subdivision (c) the distinction between the lay witness and the expert should be maintained, but that the phrase "acquired prior to the origin of the controversy" be stricken and the phrase "not acquired for the purpose of litigation" be substituted therefor. Professor Cleary stated that he was concerned over the possibility that the requirement of personal knowledge is too restrictive and suggested the word "familiarity" unless a better one was suggested. There was no opposition from the floor to using the more general context such as "familiarity" rather than the more specific term "personal knowledge."

Subdivision (d)

After thorough discussion of this subdivision, Judge Estes suggested the terminology follow the language of the Federal Statute as it now exists,

28 U.S.C. §1731. Mr. Epton stated that what the Committee is striving for is not the effect of this evidence as it comes in, but the admission of the exemplar without unfair or unconstitutional implications. He felt the rule should say that the comparison of a writing of the prior fact or by the expert witness with specimens which the court finds as prima facie fact have been accepted or treated as authentic by the opposite party. After further discussion the Chair stated that from the conversation the consensus appears to be that there is need for a stronger persuasion for the admission of the exemplar than other bits of evidence in the case and that the Committee is willing to resolve the issue raised by Judge Estes and not leave it as Congress recites. Mr. Haywood moved that the words "to the satisfaction of the court" be deleted. Mr. Berger offered an amendment to Mr. Haywood's motion to read as follows: "Comparison of writing, by the trier of fact or by expert witnesses, with specimens which, for the purpose of admissibility, the court finds . . . ." Mr. Berger's amendment was placed before the Committee as a policy issue and carried by a vote of 7 approving to 5 against.

Mr. Haywood's motion, as amended, was restated so that subdivision (d) would read as follows:

> Comparison of writing, by the trier of fact or by expert witnesses, with specimens which for the purpose of admissibility the court finds (1) have been admitted to be or treated as authentic by the opposite party or (2) have otherwise been proved to be authentic.

Judge Sobeloff said he was concerned by the word "finds." Professor Cleary stated that he thought the confusion arose from thinking the word "admitted" meant admitted in evidence, but that it does not have that meaning. Mr. Epton thought the words "conceded to be" would be better. Professor Cleary, however, thought that the word "admitted" was better as it is a term of law, whereas "conceded" is not. Judge Van Pelt thought that Judge Sobeloff's suggestion in grammer and substance was good as he wondered if there was any necessity for the words "court finds" inasmuch as he did not think there was any necessity of the court making a finding of any kind of specimens admitted.

Mr. Selvin asked for a point of clarification. He wondered if the Committee was providing in principal a standard of admissibility for exemplar of handwriting that is different from the standard of admissibility that was agreed upon in 9-04 [renumbered 9-01]. Also, would the Committee be setting up a rule which will make judges determination whether for purposes of admissibility or making his determination primal in the case, or is the Committee precluding the jury in the case from getting a chance at the ultimate issue of the authenticity of the exemplar. The Chairman stated his understanding of the members' views were that the Committee is attempting to establish a burden of persuasion more severe with respect to the exemplar than the Committee is willing to do as to other documents. And as to finding of fact, if any, on the jury, it is the Committee's purpose to leave that issue open.

Judge Sobeloff suggested a comment to take care of Mr. Williams' point concerning the defense's attorney. He thought the comment could say the rule deals only with the question of admissibility; that it does not deal with

the ultimate determination of authenticity by the jury; and leave the question of fact open to the jury.

The Committee approved the first sentence of subdivision (d) with one member voting negatively.

Professor Weinstein moved to strike the whole second sentence as it does not seem to add anything that is not already in the first sentence or otherwise been proved; particularly since the standards and ancient documents rule which provides a method of proof would already be proposed. That is, the words "have otherwise been proved" means "have otherwise been proved by any method," which is suitable for proof and since this has already been provided by another method there is no need to put it in. It suffers from the objection again of indicating that this ancient documents rule, for this purpose, means something different from the other and, indeed, that the court does not have discretion. The words "may be made with a speciment purporting to be authentic and acted upon as such by persons having an interest in knowing whether it is authentic" may be read in light of the

first sentence as requiring the judge, if these two matters were established, to use this as a comparison signature even though he is convinced that it probably is not an accurate comparison signature or he wouldn't have let it in under the first sentence because the person acting upon it may have been a dupe and the fact that it is twenty years old does not mean anything. He further stated he thought it had a detrimental value. The Reporter agreed but thought the Committee should consider the possibility that the ancient documents rule, which is in Subdivision (i) sets up a lesser standard and in order to get an ancient document admitted, under the ancient documents rule, these things only have to be shown as prima facie. The judge's decision on these ancient documents requirements is not conclusive and he doesn't have to make a finding. There he only has to make a finding that there has been a prima facie showing of these three usual things required for the ancient documents rule. Professor Weinstein, however, did not agree. Professor Cleary further thought this could be covered in a comment with a cross

PUBLISHER'S NOTE

Page(s) 19 is/are missing.

reference to the ancient documents rule. After thorough discussion of the sentence the Committee approved Professor Weinstein's motion to strike the sentence. The motion carried with a vote of 7 approving and 2 dissenting.

Mr. Jenner inquired why subdivisions (c) and (d) were limited to writings and whether they should include artistry such as headstones, etc. Professor Cleary thought subdivision (c) should be limited to handwriting but that if subdivision (d), as drafted, were relaxed by eliminating any reference to writing it could include the typewriter. He thought in subdivision (d) a comparison could be used and strike out the words "of writing." Mr. Jenner suggested that the Committee vote on an issue of policy as to whether the Committee feels the Reporter should attempt to extend subdivisions (c) and (d) to other matters than writing. Judge Sobeloff moved that this be done. The motion was carried.

Subdivision (e)

Judge Sobeloff asked whether the word "contents" was used only in connection with documents or related to conversation. Prpfessor

Professor Cleary stated he thought it should be broad enough to include telephone conversations, but further stated that he thought this was a well-known technique of authentication. He thought it could be carried further and stated, that his Note had made a reference to language patterns. The Committee discussed the matter of patterns as it should cover more than just language patterns. Mr. Spangenberg suggested that the subdivision include contents, substance, or extrinsic patters taken in conjunction with surrounding circumstances. Extrinsic patterns were clarified to mean peculiarities, sounds, brush strokes such as on a Matisse, etc. No formal action was taken on this subdivision.

Meeting recessed at 5:00 p.m.
Reconvened at 9:30 a.m., October 15

Subdivision (f)

After discussion of this subdivision, Mr. Spangenberg moved its adoption. The motion carried unanimously. Mr. Haywood asked Professor Cleary whether in working up this subdivision he had any qualifying thoughts as to particular circumstances. Professor

Cleary stated that there are a surprising number of cases involving an identification of the voice after the act has been committed. Blackmail was mentioned as an example; also rape cases in which the victim was contacted by telephone after the act was committed.

Subdivision (g)

After discussion of this subdivision, Mr. Jenner stated that it seemed to be the consensus of the Committee to keep in mind that this is basic authentication. The Committee would like subdivision (g) to be sufficiently broad enough to cover the usual listing in the directory, plus other means of identifying locationwise or otherwise a telephone number as one that has been assigned by the telephone company. It may be to a false name but it has a degree of regularity or authenticity can be established then prima facie it is authenticated for the purpose of admissibility depending on whether it is otherwise admissible. Professor Green thought it should be done by retaining the present language and adding another phrase to take care of points raised during the discussion, such as proving what the telephone operator says, etc. Professor

Cleary suggested that the phrase "or otherwise proved to have been assigned to, or used by, the person" be added at the end of the sentence. Mr. Selvin suggested this be cross referenced to the hearsay rule. Mr. Selvin's suggestion was informally approved. Subdivision (g) was unanimously approved to read as follows;

> (g) Evidence of the making of a telephone call to the number for the person in question furnished by the telephone company through its directory or an operator, or otherwise proved to have been assigned to or used by the person.

Professor Cleary mentioned a companion point -- the usually recognized presumption that when telephoning a place of business the presumption is that the person answering the phone is an agent who is authorized to transact business of a kind that can reasonably be transacted over the telephone. He stated that he did not deal with this point in the draft as it is not strictly a problem of authentication. He merely thought that at some time the Committee may want to deal with it. He also suggested that it could

be incorporated here as subjectwise it would fit in -- logically, it would not. The consensus of the Committee was that this matter be deferred and the Reporter should present it to the Committee in the future.

Subdivision (h)

The Reporter suggested that the last phrase of this subdivision "or a certificate by the custodian to that effect" be stricken and that the phrase be dealt with in another section. After discussion, Mr. Jenner stated the Committee should decide whether the over-all policy is to be in general that the Committee liberalize in the way of admission of proof particularly in those places where the party against whom or with respect to whom the proof is being offered has not had an opportunity to check it. Mr. Spangenberg moved that subdivision (h) be adopted with the sentence ending with the word "kept," and deletion of the phrase which remains. Mr. Erdahl inquired about public records from foreign countries. Judge Maris stated that the Advisory Committee on

Rules of Civil Procedure in conjunction with the Commission and Advisory Committee on International Rules of Judicial Procedure, had developed a proposal which would take care of the matter of authentication of foreign and domestic records. The matter of certification of foreign and domestic records was also discussed. The Chair suggested that the limitation of subdivision (h) be deferred until specific proposals with respect to foreign records are considered at a later time during this meeting. Mr. Spangenberg restated his motion that subdivision (h) with respect to domestic records be approved. The motion was duly acted upon and carried.

Dean Joiner inquired about the words "official record" being used in the best evidence rule and the words "public record" being used in this subdivision. Professor Cleary stated that he had made a note to see that these two rules conform.

Subdivision (i)

The Reporter stated that the word "of" in the second line of subdivision (i) should have been "concerning its" so that it

would read "is in such condition as to create no suspicion concerning its authenticity." In the phrase under (ii) the words "such a" should be deleted to read "was in a place where the document, if authentic, would be likely to be, and." Mr. Epton suggested that in the phrase "would be likely to be" in item (ii) the words "be" and "to" be deleted to read "would likely be." The consensus of the Committee was that this should be done.

After discussion of this rule in general and of the time limit, Mr. Haywood moved that subdivision (i) be adopted with the changes suggested by Professor Cleary down through subsection (iii) to end with the word "offered," but with the change in 20 years to 30 years. Mr. Williams moved an amendment to Mr. Haywood's motion that the number of years remain 20 as shown by the Reporter. Mr. Spangenberg called for a preliminary vote on the sense of the Committee as to whether a time limit is wanted and if so whether 20 or 30 years. Mr. Haywood and Mr. Williams withdrew their

motions in deference to Mr. Spangenberg's motion. Mr. Spangenberg stated his motion to read as follows:

> (i) Evidence that a writing (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where the document, if authentic, would likely be, and (iii) is at least __ years old at the time it is offered.

The motion was duly acted upon and carried with two members voting negatively. Mr. Williams moved the time limit be stated as 20 years as drafted by the Reporter. The motion was duly acted upon and carried with 7 members voting for 20 years and four preferring 30 years.

The Reporter stated he would like to withdraw the last clause "or evidence that a writing is otherwise indicated by circumstances to be authentic," as he thought a dragnet should be put in to take care of custody cases. Professor Green thought there might be another section on public custody which spells out private custody. He further suggested that subdivision (e) be used and that Professor

Cleary be instructed to clarify it with a comment. Professor Cleary stated that he would take care of the comment. Mr. Haywood moved the Reporter's suggestion to eliminate the last part of the sentence "or evidence that a writing is otherwise indicated by circumstances to be authentic." The motion carried.

Subdivision (j)

The Reporter suggested a revision to read "any other means provided by an act of Congress." Professor Green asked for a clarification as to whether the Reporter's idea was to take care of any other method of authentication in the first part of this subdivision. Professor Cleary stated that he would be prepared to feel, with the risk of some repetition, that there should be a dragnet (perhaps as an additional subdivision) that would go back to 9-04 to pick up the general language to be sure this is not taken as an exclusive enumeration of methods of authentication. Included in the new subdivision would be any other evidence sufficient to support a finding that the matter in question is or at a

relevant time in the past was as claimed by its . The Committee suggested that this be done by comment rather than subdivision. It was further suggested that the introductory provision be left out and a new subdivision be included in lieu thereof. Professor Cleary thought it was more important to have the introductory clause than to have it placed at the end, and after discussion of this matter, it was the consensus of the Committee that the Reporter be instructed to prepare a redraft for the next meeting. The Chairman stated he did not think the Committee had reached a point where it wanted to make a decision as to whether the topics should be left as illustrations or should be placed in the comment until after consideration of all rules dealing with authentication. At that time an objective decision in this area could be made. The Reporter was asked to prepare a redraft.

Rule 9-01. Prima Facie Authenticity. [To be renumbered 9-03]

The Reporter stated that the discussion could start out from the position that there are some situations which will be agreed

upon that no preliminary evidence of authenticity in the noraml sense of the word ought to be required. Also, that documents and perhaps other things in addition to documents can be proved up without any testimony as to authenticity and leave it open to the opposite party to dispute. He stated that the first three sub-divisions of the proposed rule had been contained in proposed Rule 44 in the Preliminary Draft of the Civil Rules with the exception being that this has been broadened to say "documents" rather than "official record" as being broader and more inclusive. He felt there are many things today which are provable by certificate but which, in a sense, are not public records and do not constitute a record such as certificate by a public survey, marriage certificate and public surveyor's certificate. Judge Maris stated that the proposed amendment to Rule 44 does not change the word "official record" -- it was also in old Rule 44 -- the proposed rule does not expand the concept. He did not think the Civil Committee had addressed itself to this problem.

Professor Green moved that the Committee approve the use of the word "documents" instead of the words "official records" in this rule. The motion carried unanimously. Professor Green then moved that subdivision (a) of this rule be amended so that the last clause reads "and a signature purporting to benan attestation or execution is prima facie authentic." The motion carried unanimously.

Judge Maris asked if subdivision (a) would include a municipal subdivision, and Professor Green suggested that on the fifth line of subdivision (a) the word "thereof" be deleted and the words - "of any entity mentioned above." beaadded. Mr. Spangenberg moved that this Committee, as a matter of policy, instruct the Reporter that they would wish subdivision (a) to apply to public agencies, public corporations, municipal corporations, and in general all public or political subdivisions of the state, the language to be drafted by the Reporter. The motion carried unanimously.

Professor Green asked if a Notary Public would be covered by this subdivision and the consensus was that he would. Mr. Haywood asked if a picture of a seal would apply where it states a seal and Professor Cleary stated that the Seventh Circuit said it did. However, the Committee decided this point was for the judge to decide.

Subdivision (b)

Subdivision (b) was approved with the deletion of the word "such" in the third line and deletion of the comma after the word "officer" in the fourth line. Dean Joiner expresseed concern over subdivision (a) applying to a signature either of attestation or an executed signature with a seal, and subdivision (b) applying to a document signed by an officer who does not have a seal, and he wondered if it were possible to have a document of a public nature that is not signed by an officer. He inquired whether the authentication procedure should follow as in subdivision (b). Professor Cleary stated that Dean Joiner's point could be met

by using in both subdivisions (a) and (b) the term"document or certification." Mr. Berger questioned whether "certification" should be used as this could be part of a document. It was the consensus of the Committee that the Reporter should be asked to prepare a redraft of this subdivision.

Subdivision (c)

It was decided that the Committee was limited on this subdivision as it should follow the proposed amendments to the Civil Rules and this should be deferred to a later date. Mr. Berger questioned the words "and accuracy" as he thought those were two disparate concepts -- one being authenticity of genuiness and the other accuracy which he thought required some evaluation of the contents of the document. Mr. Williams stated he thought the words "and accuracy" did not mean the accuracy of what is related in the document but that the copy proffered was an accurate copy. Mr. Berger stated that if that is what is meant it should be more specific. It was decided that the words "and accuracy" means accuracy of the reproduction.

Subdivision (d)

The Reporter stated that this subdivision was an effort to pick up the evidentiary sections of the Uniform Commercial Code. It was the consensus of the Committee that the Reporter be instructed to see what he could do by way of picking up the Commercial Code provisions and drafting an acknowledged document provisions that seems reasonably to conform to the average and traditional state practice.

Subdivision (e)

It was the consensus of the Committee that subdivision (e) should be placed before subdivision (d). Professor Cleary stated that this subdivision is conventional and he hopes it will be adopted. Mr. Berger moved adoption of subdivision (e) in the draft with the deletion of the word "printed" in the second line and insertion therefor the word "issued," and that subdivision (e) be placed before subdivision (d). The motion carried unanimously.

Mr. Epton thought the drafting could be improved by saying "a book, pamphlet, or other publication, is prima facie issued

by the public authorities. He thought this would eliminate "authentic." Professor Cleary said that he would attempt to incorporate all suggestions in the final draft.

Subdivisions (d), (f) and (g) [subdivision (d) to be renumbered Subdivision (e)]

Professor Cleary stated that he hoped in some fashion the appropriate provisions in the Commercial Code could be incorporated in this rule or subdivisions, and that the same could be done with acknowledged documents. He felt that if this is done it will still leave the problem of whether the Committee wants to accept the other evidentiary aspects of the Commercial Rule provision which require that the document to be authorized or issued by the third party should be prima facie of the facts stated in the document by the third party -- or the hearsay provision. The burden of proof situation and the matter of hearsay will also need to be considered. Mr. Williams stated he was concerned about subdivision (e) regarding acknowledged documents, as he felt that acknowledged documents means that a number of witnesses statements taken by the FBI are required to be acknowledged under the regulations

of the FBI. He could foresee some lawyers arguing that a document is an acknowledged document and offer it as such. Professor Cleary, however, stated that he would pick out a good typical state statute dealing with title documents, primarily, and follow this.

Dean Joiner thought a provision was needed pertaining to the signature of the maker of the note. Mr. Berger stated that before the policy issue was decided he would like to direct attention to the phrase "records pertaining thereto." He felt this indicated that anything pertaining to a commercial paper was prima facie authentic. Professor Cleary stated it was his understanding that the first two lines of renumbered subdivision (d) are to be deleted and provisions of the Commercial Code will replace them. Mr. Berger asked for a point of clarification and it was decided that this should be taken to mean that not everything in records pertaining to commercial papers are prima facie evidence of the facts contained. Professor Cleary stated it would apply to bank records and other similar records. Discussion was then turned to the

"third party." The Reporter stated that he gathered the Committee had agreed that the first two lines of renumbered subdivision (d) are to be deleted and provisions of the Commercial Code will replace them. Mr. Berger felt that was the issue that was being challenged -- whether the provisions of the Commercial Code will be enacted as the Federal Rules of Evidence. He thought this was a policy question which should be settled. Dean Joiner suggested that the Committee resolve the issue by asking the Reporter in his next draft to include the authenticating provisions of the Code in his language in such a way as to cover the matter in this section and then to reserve the burden of proof sections and hearsay aspects for the hearsay parts of the draft. Mr. Jenner suggested the Committee might like to instruct the Reporter to draw alternative drafts. The consensus of the Committee was that alternative drafts pertaining to the commercial papers subdivision would be appropriate.

Subdivision (f)

Dean Joiner thought the language in subdivision (f) should read: "a purported printed copy of a newspaper or purported periodical is prima facie of the newspaper or periodical it purports to be." Professor Cleary stated that the word "authenticity" was being used in the drafts and that the first rule entitled "Effect of Authentication," as amended, will be along the lines of what Dean Joiner has in mind. Dean Joiner stated, however, that he did not feel this took care of the problem. Professor Cleary summarized the suggestion that a purported printed copy be used. Discussion washeld on the phase of the rule as to whether the Committee should accept a copy of a newspaper or periodical in evidence without further authentication; and secondly, the extended evidentiary aspect that it is also prima facie evidence that any advertisement or notice therein was authorized by the person on whose behalf it purports to have been published. Mr. Berger moved that the sense of subdivision (f), without agreeing to any particular language, be adopted without any prima facie evidence language --

limited to authenticity, prima facie what it purports to be. Mr. Selvin stated that he had no objection to proving that the issue was authentic but to go beyond that to prove who put the advertisement in the paper was entirely a different matter. It was understood that this was not the intended meaning. Mr. Berger clarified his motion to indicate that the proponent would be able to offer that the particular issue of the newspaper contained the advertisement and that it should not go beyond that. After lengthy discussion, the Chair stated the consensus of the Committee that the Reporter be instructed to draft a rule which will cover the subject of authenticating newspapers and periodicals in a broad sense and that as to the evidentiary effect the Reporter submit it either by way of alternative or in another section or article of the rules as he sees fit. The statement of the Chairman was approved as the consensus of the Committee.

Subdivision (g)

This subdivision presents a group of miscellaneous situations which have a common interest. Mr. Selvin stated that he felt there

was a drafting difficulty involved -- the first problem being that there is a discrimination between the ownership of property in the mark, name, or brand and the product to which it is attached, and secondly, as now drafted there is a question of the ownership of the product to which it is attached. Professor Cleary stated that Mr. Selvin was correct in the fact that two situations are being dealt with and wondered if the two situations should be dealt with separately. Mr. Haywood suggested that subdivision (g) be handled in the same manner as subdivision (f) in that the Reporter be instructed to draft the subdivision to cover the authentic area as it is and leave to the Reporter's discretion whether the other areas should be worked in. The motion carried.

Rule 9-02. Effect of Prima Facie Authenticity

The Reporter stated that once the policy is agreed upon it can be incorporated in the opening sentence of the prior rule. Mr. Berger thought the term "admissibility" was confused with "authenticity." He thought this was a language problem which was not intended but mentioned it for consideration in the redrafting.

He felt that the mere fact that something is prima facie authentic does not make it admissible. Professor Cleary thought the Committee could go back to Rule 9-01 and cover the matter in the terms of a condition preceding admissibility. Mr. Selvin stated that in order to choose between the two alternatives or to draft a section having this effect, consideration would have to be given to the whole policy of presumptions. He suggested that this provision be deferred until presumptions are taken up. Professor Cleary stated he thought the Committee could proceed with drafting up to the point where the rule says that these are admissible in evidence without further proof of authenticity and itemize them. The part concerning burden of proof could be deferred and then continue to put it into alternative form. It was the consensus of the Committee that the Reporter understood the thinking of the Committee on this rule and that he submit a redraft.

Rule 9-05. Subscribing Witness' Testimony Unnecessary

Professor Cleary stated that there is a question in his mind as to whether a Federal set of rules needs anything in this area. However, Mr. Jenner stated that the Model Code has the rule, the

Uniform Rules have it, and he felt there must be a problem contained. He therefore felt that consideration should be given to the rule before a decision was made to delete it. Professor Cleary explained the background for the rule and brought up the matter of witnessing a will. It was brought out that the Federal courts do not probate wills and therefore the matter should be of no concern. Mr. Spangenberg moved that Rule 9-05 be adopted in abbreviated form to say the testimony of subscribing witnesses is not necessary to authenticate a writing. The motion carried.

Meeting recessed at 4:55 p.m
Reconvened at 9:00 a.m., October 15

Memorandum No. 3

The topic of writings and recordings was discussed in conjunction with the best evidence rule and the unanimous decision of the Committee was that the best evidence rule is needed in the drafting of Rule 10-01. The Reporter was instructed to broaden or narrow the drafting of the rule as he feels necessary.

Rule 10-1. Definitions

Subdivision (-)

The Reporter explained the basis of his treatment of this subdivision to show that "writings" include other things besides words written on a piece of paper. Discussion was held on the matter of photographs and several members thought photographs should be handled separately. Mr. Haywood moved that subdivision (a) be adopted as stated by the Reporter. It was suggested that "magnetic impulse," be inserted immediately preceding the word "mechanical." Mr. Jenner inquired whether this subdivision should also include "inscriptions." Professor Cleary thought that an inscription would be a letter, word, or number, and, if not, it would be a picture. Professor Weinstein inquired about the phrase "in reasonably permanent form." After discussion of the phrase, the Committee decided the phrase should remain.

Professor Weinstein then suggested that instead of the words "letters, words or numbers, or their equivalent, set down," the words "communications recorded" be inserted therefor. He stated that he was unhappy about using the word "pictures." He thought that

if the picture problem where a scene is recorded were excluded then you exclude hand motions, shrugs, etc. which are not verbal in the judicial sense. Mr. Williams suggested that in order to take care of Professor Weinstein's point, the words "still or moving pictures" be substituted therefor. Professor Weinstein agreed this would take care of his problem, but Professor Cleary pointed out that this would not fit in with the rest of the sentence.

Professor Weinstein then moved that the Reporter be requested to consider the matter of photographs and movies, and to draft a proposed rule either incorporating it in Article X or in a separate provision for reconsideration. His motion was withdrawn, however, in respect to Mr. Haywood's motion already on the floor. Mr. Haywood's motion was restated that subdivision (a) be approved with the phrase "magnetic impulse," inserted after the word ""photographing," and the deletion of the phrase"in reasonably permanent form" at the end of the sentence, placing the period after the word "means." Professor Weinstein then offered an amendment to Mr. Haywood's motion by adding the word "pictures"

after the word "words." Dean Joiner stated he thought the substance of Professor Weinstein's motion was good but he would vote against it because of the draftsmanship. Professor Weinstein pointed out that he did not intend his motion to be restrictive and the Reporter could take care of the drafting. It was the consensus of the Committee that the policy be resolved by inclusion in subdivision (a) or preparation by the Reporter of a separate subdivision dealing with and intending to incorporate in the best evidence rule the matter of photographs.

Professor Cleary thought at this point the Committee may want to substitute the Uniform Rule for his proposed rule. Judge Estes stated that he preferred the Reporter's draft and the Committee adopted the motion to approve subdivision (a) as stated in Mr. Haywood's motion.

Subdivision (b)

Professor Cleary stated that he had taken the word "original" to include carbon copies which are treated as an original, such as a carbon of a bank statement, and carbon copies which are

signed and dated as being exact duplicates of the original. Judge Maris stated concern over the phrase "legally operative" as he thought there were writings which should be included here but which are not legally operative. Dean Joiner thought it would be better to say "the original is the writing or recording itself or any counterpart intended to have the same effect." It was the consensus of the Committee that the Reporter should furnish a redraft. Dean Joiner brought up the matter that there may be as amny as five originals and he wondered if htis had been taken into consideration.

Subdivision (c)

The Reporter inquired of the Committee whether the definition of a "duplicate" is sufficiently broad enough to include subsequently made manual copies. Professor Green moved that the Committee approve subdivision (c) as drafted by the Reporter which would mean that handwritten copies or compared copies are excluded from subdivision (c). This was clarified as being the sense of the Committee and the precise wording would be left to the Reporter. The motion carried.

Rule 10-02. Best Evidence Rule

The Reporter stated that this is more or less a conventional rule and inasmuch as there would probably be no controversy the subdivision should be passed over for the time and consideration be given to the next subdivision. It was so agreed.

Rule 10-03. Exceptions: Duplicates

The Reporter gave the background on the drafting of this rule and Mr. Williams stated that he thought there was an inconsistency between this rule and Rule 10-01(c) inasmuch as this rule states "fairness requires access to parts of the original not included in the duplicate," but Rule 10-01(c) states duplicate is defined as "a precise reproduction of the original." Professor Cleary cited a Japanese case in the Second Circuit which would highlight some of the problems. Professor Weinstein stated he thought the rule as drafted is a fine rule but he would have less reservation about it if, before it is put into operation, the other side would have to be notified before the trial that you

intend to rely on the duplicate and that he must furnish a copy. Professor Cleary stated that he felt insofar as possible the Committee should steer around the requirement of giving notice to the opposing party. Professor Weinstein stated he thought there was a lot of force to that argument but on the otherhand there are two problems to stay between. Professor Cleary thought his draft partially took care of Professor Weinstein's point by saying "unless a substantial question is raised as to the authenticity of the original . . . ." Judge Van Pelt stated he was not satisfied if the draft is going to say "that the precise reproduction of the original is not a complete reproduction". Judge Estes stated that in support of Professor Weinstein's argument he felt that a set of rules of evidence is being drafted to fit in with the trial of the law suit in the courthouse from the day it is filed until the time the evidence is offered to arrive at a just, speedy and inexpensive disposition of a law suit and people should not be allowed to take either all or part of an original document and

offer it in evidence in a law suit unless it has been seen or the original has been accounted for in this trial. Judge Estes stated that the modern law suit would have to deal with computer evidence,and the Chairman asked the Reporter to keep this in mind in dealing with the drafts. Judge Sobeloff suggested that after the word "or" in the third sentence that the rest of the sentence be deleted and the following terminology be substituted therefor: "the court finds that in the circumstances unfairness to the opponent would result from its admission."

At the stated time for adjournment no formal action had been taken on this rule.

The dates of February 3, 4, and 5, 1966, were set for the next meeting of the Committee.

The meeting adjourned at twelve o'clock noon.