D R A F T

MINUTES OF

ADVISORY COMMITTEE ON RULES OF EVIDENCE
MEETING of MARCH 2, 3, and 4, 1967

The eighth meeting of the Advisory Committee on Rules of Evidence was convened in the ground floor conference room of the Supreme Court Building on Thursday, March 2, 1967 at 9:12 a.m. and was adjourned on Saturday, March 4, 1967 at 1:05 p.m. The following members were present:

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

Mr. Herman F. Selvin was unable to attend. Honorable Albert B. Maris, Chairman of the standing Committee, was in attendance during the entire meeting.

Judge Maris was acting Chairman until noon of the first day, because Mr. Jenner had been delayed.

PROPOSED RULE OF EVIDENCE 5-11 - SECRET OF STATE

Professor Cleary read the proposed rule. There was a general discussion on whether press release material which has not been officially disclosed were still considered to be secret, and the consensus was that it is. Dean Joiner moved that the proposed language be approved. Judge Estes seconded the motion. Further discussion ensued. Mr. Epton said he would use the words "A 'secret of state' is one that has not been officially disclosed." The discussion carried into subsection (b) and Judge Sobeloff suggested that the words "only after a showing to the satisfaction of the judge that there is reasonable danger" be used in lieu of "upon a showing of". Mr. Berger suggested deletion of "information not open or theretofore officially disclosed to the public" and substitution of "one", in subsection (a). There was discussion along the lines of the need of delineating in lines 4 and 5, and a few language change suggestions, such as changing "involving" to "concerning" and "public security" to "national security". These were agreed to. There was extensive discussion on the broad interpretations which could be given to "national security". Dean Joiner moved that the last four lines of (a) read as: "national defense or the international relations of the United States." Judge Estes seconded. After a brief discussion, a vote was taken on Dean Joiner's motion. FAVORED - 9; OPPOSED - 2. MOTION WAS CARRIED.

Following an exhaustive discussion concerning whether or not information is to be considered secret when, although it has been published in newspapers throughout the country, there has been no official disclosure, a vote was taken on Mr. Berger's motion to strike the words "information not open or theretofore officially disclosed to the public." FAVORED - 2; OPPOSED - 9. MOTION WAS LOST. Professor Weinstein moved for approval of (a) as amended. Judge Van Pelt seconded. FAVORED UNANIMOUSLY to have subsection (a) read: "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."

[Recess - 11:00 a.m. to 11:25 a.m.]

(b) General rule of privilege

Professor Cleary read his comment on subsection (b). Professor Weinstein felt that the proposed wording "any person from giving" might be a violation of the freedom of speech. He felt that it made the rule one of substance rather than one dealing with evidence. Mr. Raichle shared that view. Professor Weinstein felt that it is the privilege of the Government to prevent a person from being compelled to give evidence, but it is not the privilege to prevent the person from giving the evidence when he wants to. During the discussion that followed, the reporter said that he had decided to take "compulsion of" out of line 9. This was agreeable.

Professor Weinstein suggested that "being compelled to give" be substituted for "giving" in line 8. There was a general discussion concerning the giving of evidence, when the Government is a party to the case, and the general giving of evidence in civil cases, where the Government is not a party but objects to evidence being given. Mr. Williams moved that 5-11(b) be amended, in line 9, after the word "danger", by the addition of the words "which at the request of the Government may be made in camera." He felt, however, that the wording was faulty. There was further discussion on hearings. The sense of Mr. Williams' motion was agreed upon. Professor Cleary offered the wording as: "Upon the request of the Government the hearing upon the claim of privilege may be in camera." Mr. Williams accepted the reporter's proposed wording. During a discussion concerning in camera proceedings, in general, Judge Maris read Rule 16e of the Federal Rules of Criminal Procedure. Professor Cleary suggested that the Committee consider abandoning the proposed amendments in the forms in which they had been suggested and approve the subsection in its present language, subject to striking out "compulsion of" in line 9, with the understanding that Criminal Rule 16e, appropriately adapted, would be incorporated in the next draft of the rule. Mr. Jenner said that he understood it to be the

sense of the Committee that the district judge be afforded the discretions, along the lines of the Federal Criminal Rule and incorporating also that the showing may be made in camera. It was agreed that a state secret should not be disclosed and sealed.

[Lunch from 1:03 p.m. to 2:10 p.m.]

Mr. Jenner informed the Committee that he had advised Chief Justice Warren several weeks ago that the objective of the Committee is to submit to the standing Committee a draft of the rules in the summer of 1968.

Mr. Jenner stated that the chair would assume that (b) had been approved as a first round approval - the editing which was done plus direction to the reporter to prepare a provision in (b) to give the district court judge discretion somewhat along the lines of the Criminal Rule [FRCrP 16e] to protect the secret and to hold the hearing in private on a showing of reasonable danger.

(c) Who may claim.

Professor Cleary read his comment to the subsection. He explained that in line 16 of the subsection the words "stay further proceedings and" should be stricken. Dean Joiner moved that (c) be approved as amended by the reporter. UNANIMOUS APPROVAL.

(d) Effect of sustaining claim.

Professor Cleary read his comment. Dean Joiner suggested that the language be broadened. The language which he proposed was: "If a claim of privilege for a secret of state is sustained, the judge shall make any further orders which the interests of justice require - such as, in the case against the Government, striking the testimony of a witness, declaring a mistrial, or finding against the Government upon an issue to which the privileged matter is material." This gives your example in cases where the Government is involved but yet gives the court power in all cases to deal with this matter as the interests of justice may require. There was discussion concerning the Tort Claims Act. Mr. Berger moved that subsection (d) of 5-11 be extended to cover criminal proceedings and those civil proceedings in which the Government is a party and that the reporter further consider the Tort Claims statute to see whether or not that would inhibit the Committee from permitting a rule which would extend 5-11(d) to all civil proceedings including those in which the Government is a defendant as well as those in which the Government is a party. Vote was taken on the motion. FAVORED UNANIMOUSLY. Dean Joiner moved that the reporter be asked, with regard to his redraft, to provide at least that the clause "shall make other further orders which the interests of justice require" be applicable to all proceedings, whether or not the Government is a party. Vote was taken. UNANIMOUS APPROVAL.

PROPOSED RULE OF EVIDENCE 5-12. IDENTITY OF INFORMER

Professor Cleary read the proposed rule and comments thereto. Mr. Williams pointed out that abuses of the privilege granted under this rule are rampant. Professor Cleary said that he thought the safeguards against what Mr. Williams had suggested, consisted of not destroying the privilege but putting in a provision which requires disclosure of the identity of the informer when it is material. There was extensive discussion on the subject of professional and confidential informants, electronic devices used for information, and the propriety of using such devices. Mr. Williams moved that proposed Rule 5-12 be abolished. Vote was taken. FAVORED - 3; OPPOSED - 7. MOTION WAS LOST.

Mr. Raichle moved that wording of subsection (a) be: "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 by another person, if there is a reason to believe that this would imperil life or limb of the informant." Following a discussion concerning the probable dangers to identified informants, a vote was taken on Mr. Raichle's motion. UNANIMOUSLY OPPOSED. MOTION WAS LOST.

Professor Weinstein could see no reason for the phrase "by another person" in line 5 of subsection (a). There were no objections to its being stricken.

Mr. Haywood moved for the adoption of 5-12(a) as amended. Vote was taken. FAVORED - 8; OPPOSED - 2. It now reads:

"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.

There was a short discussion on whether "subdivision thereof" refers to just State, and the consensus was that it does, since there are really no subdivisions of the United States Government.

Judge Van Pelt moved the approval of the subsection.

There was a discussion on state and federal prosecutions. Professor Weinstein suggested the addition of the words "If the Government does not object" at the beginning of the subsection. After further discussion, Mr. Jenner stated that the proposal was that the thrust of the rule, as far as the right of asserting the privilege, be limited to the United States; that the United States in asserting it may embrace a state informant as well as a federal. This would involve deletion of "a state or subdivision thereof" in (a) and the deletion of (b) entirely. Judge Van Pelt asked what was done in a habeas corpus case in the state of Nebraska when the state was defending and it was desired to protect the name of the defendant. It was replied that the U. S. Attorney would be asked to claim the privilege. Judge Van Pelt stated that the U. S. Attorney was not a party, and the Government had

nothing to do with it. Mr. Jenner said the attorney general would appear in a habeas corpus case. There was a discussion on whether or not the U. S. Attorney could claim the privilege. Judge Van Pelt asked if the addition of the words "if a State or subdivision thereof is a party to the action", to the second sentence of (b), would help the problem. Judge Estes suggested that Uniform Rule 36 be used as a substitute for proposed Evidence Rule 5-12. Mr. Jenner explained the provisions of Uniform Rule 36. There was a short discussion, and Professor Weinstein moved that in line 9 of subsection (b), the following be added at the beginning of the sentence: "Unless the Government objects". Judge Estes was satisfied with that motion. Vote was taken. UNANIMOUS APPROVAL. Mr. Jenner stated subsection (a) remained as previously voted on - as proposed by the reporter and amended with the deletion of "by another person" at the end of the sentence.

(c) Exceptions.

Professor Green suggested that the title be changed, as it is inaccurate, and that (2) and (3) are not exceptions to the rule - but rather go off on a tangent and are additions to the rule. Mr. Berger suggested making (c) Voluntary Disclosure; changing (2) to (d) Informer a material witness, and changing (3) to (e). There were no objections to those changes.

(c) Voluntary Disclosure

In answer to questions on wording used, Professor Cleary read his comment. There was extensive discussion on the informer being allowed to disclose his identity. Professor Cleary suggested the addition of the words "or if the informer is called as a witness by the Government" at the end of (c). Professor Green thought that went too far. Mr. Berger thought it was too narrow. He suggested that it be: "or if the informer appears as a witness." Mr. Epton stated that he supported the motion to approve (c) and leave the problem of language to the reporter. He would like to have the thrust of the rule be that "No privilege exists under this rule if the informer becomes a witness or his identity or interest has been disclosed by outsiders by the holder of the privilege or by the informer." A vote was taken on Mr. Berger's motion to amend Professor Cleary's amendment, at the end of line 16, by making the addition of the words only read: "or if the informer appears as a witness". FAVORED-8; OPPOSED-3. MOTION WAS CARRIED. Mr. Williams moved for approval of subsection (c) as amended. UNANIMOUS APPROVAL. It reads: "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."

[At this point, a meeting was tentatively scheduled for Thursday, Friday, and Saturday, May 25, 26, and 27. See later action on this.]

Meeting was adjourned at 5:05 p.m.
It was resumed on Friday at 9:20 a.m.

Judge Maris presided at the opening of the meeting, as Mr. Jenner was detained.

5-12(d) Informer a material witness.

Professor Weinstein suggested the addition of "or the judge shall make any further order" after the word "dismissed". The principle suggested by the addition was voted on - language left to the reporter. UNANIMOUS APPROVAL of principle.

(e) Probable Cause for Search.

Professor Cleary said that fundamentally in talking about search and seizure cases, if the search is made pursuant to a search warrant then an affidavit is required; if there is no search warrant, the legality of arrest determines legality of the search. Mr. Erdahl related facts of the Rugendorf case, in which the attorney strenuously insisted that he needed the name of the informant to determine the integrity of the affidavit. The court assumed, for the purposes of decision, that the integrity of the affidavit may be attacked, but it said "We are of the opinion that even so, this search warrant is valid." It upheld the trial court not only in refusing

disclosure of the identity of the informant but in disallowing questions as to the time and place of the conversation between Agent Moore and the informant, because that might have lead to disclosure of the identity in an indirect way. Mr. Erdahl said that it seemed to him that the basis of the decision was that in the attorney's attack upon the integrity of the affidavit he had not made a sufficient showing of lack of integrity justifying withdrawing the privilege of non-disclosure of the informant. It was somewhat like the rule of Roviaro - the defendant must by his own devices make some reasonable showing indicating lack of integrity in an affidavit, a lack of truthfulness in the information, before he is entitled to disclosure of the identity of the informant.

Mr. Williams, directing his comments to Mr. Erdahl, said he suggested that when it is brought to the attention of the Supreme Court that, in the lexicon of the FBI for the past decade, the term "confidential informant" contains within its purview wiretaps and electronic eavesdropping devices which violate Section 605 of the Fourth Amendment, they are going to take a long new look at this problem. If, he said, Mr. Echols had attacked the search warrant not on the basis of the integrity of the source but on the basis of the competency of the source, it might be a very different ball game. Mr. Williams felt that

unless this rule [5-12(e)] is kept, then all the abuses to which the term "confidential informant" has been subjected in the past ten years are going to be wide open for continuation and the whole problem of the confidentiality of the informant is going to plague? There was further discussion on wiretapping and informants. Professor Weinstein said he was not sure of what the decision [Rugendorf] means. He said it may well mean that one could not go behind an affidavit or other information indicating a reasonable basis for [did not finish sentence]. Mr. Erdahl said it meant that you cannot go fishing. Professor Weinstein said that if that is what it means then it would not become relevant to find out the informant's name, because it would not make any difference at this stage. He would strike (e) completely and add after "innocence" in line 3, p. 107, the following language: "or the legality of the method of obtaining evidence." After further discussion, Professor Weinstein moved to strike proposed (e) and to add in subsection (d), at line 3 on page 107, after the word "innocence" the following: "or the legality of the method of obtaining evidence". Mr. Haywood seconded the motion. Mr. Williams suggested an amendment - the elimination of the word "substantial" in first line - and Professor Weinstein and Mr. Haywood accepted it. There was a brief discussion on "probability". Professor Weinstein moved that the word "reasonable" be substituted for "substantial". A vote was taken first on Professor Weinstein's motion to substitute

"reasonable" for "substantial". FAVORED - 10; OPPOSED - 1. MOTION WAS CARRIED. Then a vote was taken on Professor Weinstein's motion to strike (c) and to add, after the word "innocence" in line 3, p. 107, the following: "or the legality of the method of obtaining evidence". FAVORED - 6; OPPOSED - 4. MOTION WAS CARRIED. Subsection (d) reads: "Informer a material witness. If the circumstances indicate a reasonable probability in a criminal case that an informer can give material testimony on the issue of guilt or innocence or the legality of the method of obtaining evidence and an election is made not to disclose his identity, the charge shall be dismissed or the judge shall make any further order when the interests of justice so require." [Professor Weinstein said reporter could make any necessary language changes.]

[Recess held from 10:55 a.m. to 11:15 a.m.]

PROPOSED RULE OF EVIDENCE 5-13. WAIVER BY PREVIOUS DISCLOSURE

Professor Cleary read the proposed rule and comment thereto. Mr. Berger moved to strike "without coercion" in line 5 and substitute "voluntarily". UNANIMOUSLY FAVORED. Mr. Epton moved that the reporter be instructed to redraft the proposed rule to show that predecessor means of the Government. After a short discussion, Professor Weinstein moved that the rule be approved as modified. Mr. Epton suggested the addition, at the end of the subsection, of "The privilege may be waived

by the Government of state by any person who could have invoked it." There was extensive discussion on whether or not the court may or would claim the privilege on its own motion. Mr. Jenner stated that the matter before the Committee was on the motion to approve 5-13 as amended and with respect also on the standing of directions to the reporter to make some modifications in the rule. Vote was taken. UNANIMOUSLY FAVORED.

PROPOSED RULE OF EVIDENCE 5-14. INADMISSIBILITY OF PRIVILEGED MATTER DISCLOSED UNDER COMPULSION

Professor Cleary read the proposed rule. Judge Estes moved for its adoption. UNANIMOUSLY APPROVED.

PROPOSED RULE OF EVIDENCE 5-15. COMMENT UPON AND INFERENCES FROM EXERCISE OF PRIVILEGE.

Professor Cleary read the proposed rule and comment thereto.

(a) Comment or inferences not permitted.

Judge Estes felt that there should not be a word about instruction in this rule. After a discussion, which dealt mainly with subsection (c), Mr. Williams suggested that in subsection (a), the word "adverse" be added before the word "comment" in line 5. There was a discussion on comments in general. Mr. Williams withdrew his motion. Mr. Epton moved to strike out the words "by the judge or by counsel" in lines 5 and 6. FAVORED - 6; OPPOSED - 3. MOTION WAS CARRIED.

[Mr. Erdahl out of room.]

Professor Cleary asked if the Committee thought that the words "or argument" after the word "comment" in line 5 would add anything. Mr. Haywood moved that the words be added. Judge Estes seconded. FAVORED - 8; OPPOSED - 1. One member did not vote. Professor Weinstein said it was certainly arguable whether or not a privilege should be exercised. Mr. Spangenberg moved for reconsideration of the motion just carried. FAVORED UNANIMOUSLY. Mr. Haywood moved for reconsideration of the motion to strike the words "by the judge or by counsel". It was seconded. UNANIMOUS APPROVAL. Mr. Williams moved that (a) be adopted as drafted by the reporter. FAVORED - 9; OPPOSED - 1. MOTION WAS CARRIED. Mr. Spangenberg moved that the word "adverse" be inserted before "comment" in line 5. FAVORED - 5; OPPOSED - 6. MOTION WAS LOST. Subsection (a) as approved reads: "The exercise of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the judge or by counsel, and no inference may be drawn therefrom."

[Lunch period - 1:00 p.m. to 2:10 p.m.]

(b) Claiming privilege outside presence of jury.

Professor Cleary read his comment to the proposed rule. Mr. Haywood moved for the adoption of the rule. UNANIMOUS APPROVAL.

(c) Jury instruction.

Mr. Berger moved for the adoption of the proposed rule. Judge Sobeloff suggested wording as: "If a defendant indicates a preference against the giving of the instruction it shall not be given. However, in a joint trial of two or more defendants, who have not taken the stand, if the instruction is requested by any one of them, instruction shall be given." Mr. Berger stated that this language was not needed, because it is covered in (a). After short discussion, Mr. Spangenberg moved that "any" be substituted for "a" in line 11. Mr. Berger seconded. FAVORED - UNANIMOUSLY. MOTION WAS CARRIED.

Judge Estes moved that words "exercising a privilege" be substituted for "against whom a jury may draw an adverse inference therefrom". Following a short discussion, a vote was taken on Judge Estes' motion. FAVORED - 0. OPPOSED - UNANIMOUSLY MOTION WAS LOST.

Mr. Spangenberg moved that "no inference may be drawn therefrom" be added at the end of line 14. Professor Cleary suggested amending the language to read: "Upon request, any party against whom a jury may draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." Vote was taken on that amendment. FAVORED - UNANIMOUSLY. MOTION WAS CARRIED.

Judge Sobeloff moved that as a general matter of policy if the defendant does not want jury instructions given the judge may not give them. Vote was taken. FAVORED - 1; OPPOSED - 10. MOTION WAS LOST.

Mr. Berger moved that subsection (c) be adopted as amended. FAVORED - UNANIMOUSLY. MOTION WAS CARRIED. Subsection (c) as adopted reads: "Upon request, any party against whom a jury may draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

PROPOSED RULE OF EVIDENCE 5-16. OVERRULING CLAIM OF PRIVILEGE AS ERROR

Professor Cleary read the proposed rule and comment thereto. Mr. Epton moved that the rule be approved as drafted. FAVORED - UNANIMOUSLY. MOTION WAS CARRIED.

ADVISABILITY AND FEASIBILITY OF CERTAIN OTHER PRIVILEGES

Judge Estes moved that the privileges mentioned in Memorandum No. 11 - Part 4, not be adopted as rules.

Professor Cleary gave the background on the Official Information Privilege. With regard to exemptions (2), (5), (6), (7), (8), and (9) listed on p. 153 of Memorandum 11 - Part 4, votes were taken on the assumed motions that there be no rules to cover the exemptions. UNANIMOUS APPROVAL OF EACH MOTION.

Professor Cleary explained a few more points covered in this section of the Memo. There was a vote taken on the assumed motion that there be no evidence rule on the official information privilege. APPROVED - UNANIMOUSLY.

Professor Cleary proceeded to give background of the Journalist's Privilege. Mr. Epton moved that there be no rule of evidence regarding this privilege. UNANIMOUS APPROVAL.

Professor Cleary read the portion concerning Grand Jury Proceedings. He stated that the conclusion that ought to be drawn is that present Rule 6 of FRCrP has been in effect for quite a long time and the Evidence Committee should not embark upon moving into the area with rules of evidence. After a general discussion on grand jury indictments and proceedings, Mr. Epton moved that the Evidence Committee have no rule dealing with grand jury privileges. UNANIMOUS APPROVAL.

Vote was then taken on the motion that the Committee have no rule on the Accountant Privilege. UNANIMOUS APPROVAL.

Mr. Spangenberg moved for the omission of the miscellaneous privileges listed on p. 171 of Memorandum No. 11 - Part 4. UNANIMOUS APPROVAL.

[Recess from 4:05 p.m. to 4:20 p.m.]

PROPOSED RULE OF EVIDENCE 6-01. GENERAL RULE OF COMPETENCY

Professor Cleary read the proposed rule and comment thereto. He recommended that lack of religious belief, conviction of crime, connection with the litigation as a party or interested

person, and marital disqualification, except to the limited extent of actions already taken, be not grounds for disqualification of a witness. Vote was taken on the motion. UNANIMOUS APPROVAL. It was moved and seconded that 6-01 be approved. UNANIMOUSLY APPROVED.

NOTE ON PATTERNS AND PROBLEMS OF DEAD MAN'S ACTS

Professor Cleary states substance of the Note. Throughout this there was interspersed conversation as to states' statutes regarding "dead man's acts". Mr. Jenner stated that the issue was whether or not the reporter's recommendation that there be no disqualification of the witness on the basis of the so-called "Dead Man's Statute" was acceptable. Professor Cleary read pages 38-43 of the Note in support of his recommendation. Vote was taken. UNANIMOUS APPROVAL.

Meeting was adjourned on Friday - 5:03 p.m.
It was resumed on Saturday - 9:00 a.m.

PROPOSED RULE OF EVIDENCE 6-02. GENERAL GROUNDS FOR DISQUALIFICATION

Professor Cleary read the proposed rule and comments thereto.

Professor Green said he went along with the principle stated in (a). Professor Weinstein said he prefers to have the judge make the ruling on every element of credibility. Judge Van Pelt would like to see (a) couched in the affirmative. He thinks that the jury should pass on the credibility of the testimony. Judge Maris agreed with Judges Van Pelt and Sobeloff.

After further discussion, Professor Cleary stated that he felt that the position taken in subsection (a) is that the only importance that there is in any preliminary inquiry as to the qualifications of the witness is in the opportunity which it affords the judge, if conditions seem to require it, to indoctrinate the witness - to give him a little dissertation on his duties as a witness. He suggested the possible elimination of subsection (a) and the incorporation in Rule 6-03 of a provision that the judge may or shall, if the circumstances indicate the necessity, advise the witness in appropriate fashion of his obligation to tell the truth. He then read proposed rule of evidence 6-03 and comment thereto. Mr. Haywood moved that 6-02(a) be eliminated with the thought in mind that the subject matter will be included in Evidence Rule 6-03. There was a brief discussion on "hearsay". Vote was taken on Mr. Haywood's motion. UNANIMOUSLY FAVORED. MOTION WAS CARRIED.

PROPOSED RULE OF EVIDENCE 6-03. OATH OR AFFIRMATION

Professor Cleary again read this proposed rule and it was agreed that language "in accordance with his religious or ethical beliefs" were to be eliminated and the words "with his duty to do so" would be used in substitution thereof. There was a discussion on the requirement of oath taking. JudgeEsted moved that, in line 2, the words "express his purpose to" be changed to "declare that he will". Vote was taken on the motion. UNANIMOUS APPROVAL. The rule now reads:

"Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

[It was determined, at this time, that the dates of the next meeting will be May 18, 19, and 20, 1967.]

[Recess from 11:03 a.m. to 11:23 a.m.]

PROPOSED RULE OF EVIDENCE 6-02. GENERAL GROUNDS FOR DISQUALIFICATION

(b) Lack of personal knowledge

Professor Cleary read his comment to the proposed subsection. Mr. Williams felt that the only application of this rule would be where a witness is engaging in an inference or speculation or surmises. This led to a discussion on cases brought up by Mr. Berger and what actually constitutes hearsay. There was doubt as to whether this rule is needed and Mr. Spangenberg thought that perhaps there should be a rule which gives the trial judge the right to expunge the evidence or prevent the evidence. Professor Weinstein would like to drop Rule 6-02 completely and amend 6-01 to read "Every person is competent to be a witness with respect to any matter about which a reasonable person might find his testimony credible except as otherwise provided in these rules." Professor Green would change the subsection and have it read: "Unless the evidence is introduced

which may consist of his own testimony is sufficient to support a finding that he has personal knowledge of the matter; or". After a very short discussion, Professor Weinstein moved that subsection (b) be omitted. Statements concerning the elements of competency were set forth. Professor Weinstein felt that this problem could be handled perhaps by making the language read: "A person may not testify with respect to a matter if the court finds no reasonable person to find this testimony credible because he could not have perceived or remembered the matter he testified he did perceive or remember or cannot communicate with respect to the matter." Professor Cleary felt that the communication angle is not necessary. Professor Weinstein agreed it could be dropped. Judge Van Pelt read sections 701 and 702 of the California Code. Mr. Epton suggested language as follows: "Before a witness is allowed to testify as to a particular matter it must appear he had personal opportunity to know the facts that he attempts to relate or that he possesses the necessary special knowledge, skill, experience, training or education, to lend significance to his expert testimony." Mr. Jenner suggested that, in light of the discussions had in this area, the reporter re-submit material on 6-02(b).

(c) Lack of expertness or experience.

Professor Cleary read his comment on subsection. Mr. Jenner stated that his impression of the earlier discussion was that the reporter is to consider transferring this material to the earlier section on expert testimony and also that this material has already been covered. He thought the consensus was that the reporter should reconsider and re-submit. It was agreed that this was so.

PROPOSED RULE OF EVIDENCE 6-04. INTERPRETERS

Professor Cleary read the proposed rule and comment thereto. Judge Maris felt that the part concerning appointment of and compensation for interpreters is not necessary in the rules of evidence. It is already contained in the law. Mr. Haywood moved for the approval of 6-04 with elimination, beginning in line 3, of the words after "proceedings" down through the word "direct" in line 10. This motion necessitated language changes, but the thrust of it was that the provisions submitted for appointment and payment of interpreters be deleted. Several instances of interpreters being used were given. Professor Weinstein felt that this rule is not needed. Mr. Jenner stated, at this point, that sometime in the future the Committee would look at the Criminal and Civil Rules to decide which things in these rules should better be in the Evidence Rules. He felt it best to defer action on this proposed rule until that ...

[At this time, tentative dates for the July meeting were scheduled to be July 6, 7, and 8, 1967.]

It was the sense of the Committee that the reporter will consider and re-submit proposed rule 6-04.

PROPOSED RULE OF EVIDENCE 6-05. COMPETENCY OF JUDGE AS WITNESS

Mr. Spangenberg moved for its approval. After a short discussion, a vote was taken on the motion. UNANIMOUS APPROVAL of 6-05 as submitted.

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

Professor Cleary said the word "of" after "indictment", in line 7, should be stricken. Mr. Spangenberg moved for the approval of subsection (a). During a short discussion, it was agreed to add the words "has been empaneled and" after the word "he" in line 3. A vote was taken on the motion to approve subsection (a) as amended. FAVORED - MAJORITY. OPPOSED - 1. MOTION WAS CARRIED. Mr. Spangenberg was opposed; he would like the language to be "empaneled and sworn". His objection was to "is sitting"; he would prefer "has begun to sit". Mr. Jenner stated that at the next meeting, the Committee would begin the discussion with a motion to approve subsection (a) of 6-06.

Meeting was adjourned at 1:05 p.m.