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MINUTES OF THE MAY 21-26, 1970 MEETING OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

The seventeenth meeting of the Advisory Committee on Rules of Evidence convened in the ground floor Conference Room of the Supreme Court Building on Thursday, May 21, 1970 at 9:00 a.m., and adjourned Tuesday, May 26, 1970 at 4:00 p.m. The following members of the committee were present during all or part of the sessions:

Albert E. Jenner, Jr., Chairman
David Berger
Hicks Epton
Robert S. Erdahl
Honorable Joe Ewing Estes
Professor Thomas F. Green
Egbert L. Haywood
Dean Charles W. Joiner
Frank G. Raichle
Herman F. Selvin
Honorable Simon E. Sobeloff (May 21 only)
Craig Spangenberg
Honorable Robert Van Pelt
Honorable Jack B. Weinstein
Edward Bennett Williams
Professor Edward W. Cleary, Reporter

Others attending all or part of the sessions were Honorable Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professor James Wm. Moore, Professor Charles Alan Wright, and Dean Mason Ladd, members of the standing Committee on Rules of Practice and Procedure; and William E. Foley, Deputy Director, Administrative Office of the United States Courts and secretary to the committees.

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Professor Cleary indicated conformity has been used in the rules when referring to the terms judge or court. He stated this can be cleared up by adding a in Rule 11-01 in connection with the application of the rules which states where the term judge is used it can mean referee in bankruptcy, magistrate, court of appeals, etc. *Mr. Berger stated they should use "judge" throughout.

Professor Cleary indicated the present numbering system in convenient in the drafting stage because a number can be easily changed. Also these numbers are familiar to everyone with respect to their subject. Professor Moore agreed and said that using these numbers will distinguish Evidence Rules from others. To simplify it he suggested Rule 1-1, 1-2, etc.

Professor Wright agreed with Dean Joiner's suggestion of [illegible] eliminating punctuation, for example, 101, 102, etc. The advantage would be when adding a new rule it simply becomes 201.1 rather than 2-01.1. Mr. Jenner stated the consensus is that the committee retain the article style, eliminate punctuation, and start each chapter with three numbers, for example [illegible] Chapter VI on Witnesses would begin with Rule 601.

Dean Joiner stated he preferred using "not admissible" rather than"inadmissible" because of misunderstandings in spoken language. Professor Cleary suggested they defer discussion until it occurs in a particular situation.

Professor Cleary suggested they make "jury" single such as the usage in the civil and criminal rules. There was no objection.

Article I. General Provisions

Rule 101. Scope

Mr. Jenner stated they plan to transmit to the Civil Rules Committee a memorandum with respect to changes in the Civil Rules. There was no change in the rule.

Rule 102. Purpose and Construction

[illegible] After discussion of the comments received it was the consenus of the committee to approve the rule as written.

Rule 103. Rulings on Evidence

Cmte's (a) Effect of Erroneous Ruling. Professor Cleary stated the [illegible] reason for having this harmless error rule in connection with evidence even though there is one in the Civil and Criminal Rules is that so much of the mechanics of evidence hindges on this point. He stated the language, "unless a substantial right of the party is affected," has been in the Judicial Code and the Civil or Criminal Rules. The committee then discussed the question of whether this rule should be spelled out more specifically in evidencuary terms and the question raised by the N. Y. County lawyers Assn. report of who has the burden in this respect, the beneficiary of the ruling or the party complaining. There was discussion of the ABA's suggestion to [illegible] incorporate the substance of the Uniform Rules in phrasing subdivision (a) [illegible] however the committee agreed to retain the language as stated.

Professor Cleary stated he believed the suggestion of Professor Schwartz to add at the end of line 8, p. 12, "or was apparent from the context within which the objection was made" was a good one however he would word the phrase the same as in (2). The committee felt this could be unfair and possibly could be read a waiver of an objection. Professor Cleary suggested "if the specific ground was not apparent from the context." The motion to add this language carried, 7 to 6.

(b) Record of Offer and Ruling. Professor Cleary stated there had been good suggestions to put a period after form on line 20 and strike the reamining sentence. The basic purpose is that it would leave it completely within the discretion of the judge as to when and whether an offer should be made in a question and answer form.*He stated the rule as drafted has been taken from the present Civil Rule 43. *This would also shorten the proceedings.

The committee discussed whether to make the making of an offer of proof mandatory or discretionary. Mr. Berger stated they should limit this to a nonjury case. Professor Cleary summarized the various views of the organizations commenting.

Mr. Jenner stated there is no point in leaving in the phrase beginning with"unlesson line 20 because a judge will not permit an offer of proof if it clearly appears that the evidence is not admissible or is privileged. Mr. Epton made a motion to strike the remaining sentence beginning with "and" on line 20. The motion was unanimously approved.

(c) Hearing of Jury. Discussion was held on the suggestion of the D. C. Conference to change "to the extent practicable" in lines 25 and 26 to "when the interests of justice so require" to conform with Rule 1-04(c). Professor Cleary indicated the language used in Rule 1-04(c) refers only to preliminary questions whereas this rule refers to any evidence. He stated the exact phrase is not that important because he felt the interestof justice means to the extent practicable. Therefore everyone agreed that (c) would remain as submitted.

(d) Plain Error. Professor Cleary stated the one comment was from the Railroad Trial Lawyers who felt plain error is unconstitutional. He indicated there is no authority for this. The suggestion was not adopted and (d) remains the same.

Rule 104. Preliminary Questions of Admissibility

(a) General Rule. Professor Cleary stated various committees suggested deleting the second sentence, lines 6-8 making it determination is not bound by rules of evidence except ~~by~~ claims of privilege. Judge VanPelt motion to retain (a) as submitted and the motion carried.

(b) Relevancy Conditioned on Fact. Professor Cleary stated he was unsure as to whether a confession really belongs in this category. He also felt the language is confusing. He was in doubt as to whether these are relevancy situations in the sense If there has not been a confession with Miranda requirements then the confession is inadmissible ~~xhenxthe~~ and the inadmissibility is not on grounds of irrelevancy although ~~if~~ if the confession is ~~not~~ involuntary, it is not his statement and therefore is not relevant. Mr. Selvin ~~stated~~ referred to Rule 4-02 which does not limit constitutional inadmissibility to irrelevancy. Professor Wright suggested the language in (b) should make it clear that confessions are not included, if that is the case. Professor Cleary stated there are two basic situations. One is the situation in which the judge (a) is simply applying the rule of evidence and whether he is to apply the rule de pends upon certain factual ~~evidence~~ circumstances.

Judge Weinstein ~~felt~~ there should not be a subdivision (b). It is a general rule of relevancy which should be handled the way any question on relevancy is handled; that is, whether there is enough evidence to permit a reasonable juror to find whatever ~~he~~ he has to find with respect to that particular piece of evidence. Confession and conspiracy situations should be handled separately in the rules. Professor Cleary stated that the primary definition of relevancy is a logical tendency proven however in the situation dealt with in (b) it is not a question of logics. Mr. Selvin preferred to leave (b) in to point the difference between the judge's function ~~in deciding~~ when it comes to admitting the evidence and the juror's function in deciding the case. He agreed with Mr. Epton's suggestion to use admissibility instead of relevancy in (b). Than the question is not is this preliminary fact necessary to make it relevant, is it necessary ot make it admissible. Then it is obvious that confessions are taken care of by Rule 4-02. Judge Van Pelt felt the problems arose after the first sentence ~~in proper~~ re submission to the jury, therefore they should strike the 2nd and 3rd sentences. Judge Weinstein agreed ~~a~~that (b) next to (a) alerted the bar to the fact that there are differnet kinds of questions.

Professor Cleary agreed with Mr. Selvin's reasons for wanting to strike the 2nd sentence. Judge Estes then moved to delete the sentence and the motion was carried.

Mr. Epton stated the 3rd sentence would be helpful only to a few people and is not absolutely essential, therefore, should be stricken. Judge Estes said that the rule assumes that the ruling is conditional if the judge is made. Mr. Epton's reason's were different. He felt the rule meant the judge could let in the evidence however under different circumstances he could take it out. He suggested saying, "But if under all the evidence." Judge Estes moved to strike the 3rd sentence. The motion carried.

Professor Cleary stated the Dept. of Justice Cmte. suggested in line 12 "upon" should be changed to, "subject to." Also adding the ABA Antitrust Section suggested at the end of the sentence, "subject to the judge's control over order of proof pursuant to Rule 6-11(a)." The reason is to repel any implication that there is a compulsory sequence as a result of the word "upon." by changing the words to accommodate the judge's control over the order of proof. He suggested adding a final sentence, "The order of proof under this rule is subject to Rule 6-11(a)," which is the rule that gives the judge control over the order of proof. Mr. Epton understood the rule to say the evidence is not admitted actually until supporting data is supplied and the Dept. of Justice says that it was but subject to. Professor Cleary stated he felt the Dept. of Justice read "upon" to mean "after." Mr. Spangenberg suggested adding after upon, "or subject to," the intorduction of evidence sufficient to support a finding, etc. then if the lawyer says I'm going to pick it up the next day and he does not, the judge who has admitted it initially would then tell the jury it is out of the case. Mr. Spangenberg made a motion to that effect and the motion carried.

(c) Presence of Jury. Mr. Raichle pointed out the terminology of the caption is not consistent with the language. Professor Cleary indicated that when the language was changed they neglected to change the caption to Hearing of Jury. Professor Cleary stated the Chicago Bar Assn. suggestion to delete "of admissibility" from line 25 is correct because preliminary questions do not always involve admissibility, they can involve competency, privilege, and other types of evidence questions. Mr. Berger agreed with the Chicago Bar Assn. suggestion and the motion to strike "admissibility," was carried. Mr. Berger made a motion to add "these" before"preliminary"on line 24., in order to refer the preliminary questions only to those in (a). Mr. Erdahl preferred to add the phrase "under this rule." Professor Cleary pointed out that this reference would incorrectly refer to the questions under (b). Mr. Berger stated the present wording of the rule indicates it only requires it to be out of the

hearing of the jury "when the interest of justice so require." Professor Cleary stated hearings on admissibility of confessions should be conducted out of the hearing of the jury but hearings on others should be conducted when the interests of justice require. Mr. Jenner stated since there were no further motions (c) is approved.

[illegible].

[illegible].

(d) Preliminary Hearings on Confessions and Evidence. Professor Cleary indicated there have been two primary questions submitted. The ABA Committees suggested striking from line 37 "on the issue of guilt," so that the evidence is inadmissible for impeachment as well as admission of guilt. The other question is whether the situations which this rule contemplates, should be brought. There was discussion of the ABA suggestion and the meaning of the last phrase "at the trial." Mr. Berger stated that in view of the reasons given in the cases stated you cannot use the testimony given in support of a constitutional claim before. They should strike the ambiguous phrase, at the trial" and they should establish a rule that you cannot use that testimony. Mr. Berger stated a policy motion as to whether they should include impeachment. On the impeachment question Mr. Berger stated a policy motion that the inadmissibility of the entire evidence given and the motion to suppress should be inadmissible not only on the issue of guilt but on the issue of impeachment. The motion was lost. Judge Van Pelt moved that the 2nd and 3rd sentences be removed. This would leave the question to the case law. Professor Wright stated the 2nd sentence is needed giving the provision opening up the scope of cross-examination. Mr. Williams stated one has to read the rule in connection with 611 (b) and if the is stricken it would be a matter of discretion sentence whether a defendant, took the stand to protect his constitutional rights would be opended in the discretion of the judge on a matter beyond these rights. Dean Joiner agreed. The motion to strike the two sentences was lost. Dean Joiner made a motion to strike "at the trial" in order to take care of the double indictment problem. The motion carried.

Mr. Jenner asked if the note would indicate the decision of the committee on the subject of the use of the testimoney for impeachment purposes. Professor Cleary and Dean Joiner did not feel it was needed. Mr. Raichle stated unless the matter is stated it seems that impeachment is right on the issue of guilt. Mr. Epton made a motion of policy to amend line 37 by adding after "guilt" but may be used for impeachment. Mr. Spangenberg stated that he agreed with Mr. Raichle. Judge Weinstein gave examples stating that none of the suggestions offered so far gave a reasonable solution. Mr. Jenner agreed that where the witness testifies to something on the preliminary and the he gets on the stand and testifies to the opposite it is difficult to say that this should not be admitted on impeachment. However, this is a rare case. The ordinary case is somewhere in the middle. Judge Weinstein suggested after "against him on the issue of guilt" adding "and it shall be admitted on the issue of creditability only where clearly in conflict with his direct testimoney at trial." He stated the flat perjury problem does not concern anyone but the apparent conflict that a cross-examiner can use against the witness. This is what the

Committee should not allow. Mr. Raichle suggested adding, to "testimoney given by a defendant at the hearing is not admissible against him on the issue of guilt," "except as used for impeachment purpose" because according Mr. Epton's suggestion you if you use it for impeachment you are using it against him. Mr. Epton accepted this amendment to his motion. They voted on the motion to add the words in substance so that it may be used for purposes of impeachment and it is not admissible on the issue of guilt. The motion carried, 8-7. Mr. Jenner indicated the rule is unconstitutional and wanted his vote against the motion to be indicated in the record. Also he felt the question should go to the bar. Mr. Berger made a motion to add language/as suggested by Judge Weinstein. after "impeachment" The motion to add, "only if there is a clear contradiction between the earlier testimoney and the testimoney at trial." The motion carried, 8-7.

The meeting adjourned at 5:00

The committee reconvened at 9:00 a.m. Professor Cleary stated (a) dealt generally with the question of hearings in the presence of the jury while (d) dealt with a confession hearing situation with respect to the presence of the jury and branched out to the question of the admissibility of testimoney given by the accused. As a result of policy decisions in the first day's discussion he redrafted so that (c) deals with everything in connection with hearings as to presence or hearing of the jury and (d) deals separately with the question of admissibility of testimoney given by an accused at such a hearing. He stated this would take care of Judge Lumbard's problem.

During the afternoon session the redraft of subdivisions (c) and (d) were distributed to the Committee for consideration. As a matter of style Mr. Jenner suggested placing a period after "jury" in the third line and striking "and" thus beginning the next sentence with "Hearings." Professor Cleary agreed with the substance of (c) however Hefelt the first sentence in (d) should deal with any preliminary matter and the second sentence should be limited to situations in which a constitutional right is being asserted. The members felt the phrase, "in which he is asserting a constitutional right" should not be stricken from the first sentence but should remain and a new phrase, "or any other right to have evidence suppressed or excluded" should be included. The motion carried. Dean Joiner made a motion/to strike "other", and the motion carried. to amend by

to amend the text further by striking Mr. Erdahl made a motion/[illegible] "clearly contradictory of" and substitute "inconsistent with," in order to give the prosecutor a little more leeway. The motion was lost 6 to 5. Mr. Green made a motion to amend the text further by changing the [illegible] second "any" to "a" so that it reads any constitutional right but a right to have evidence suppressed or excluded. Mr. Williams stated that will imply a difference between a constitutional right and a right to have evidence suppressed. The motion lost.

of subdivision (d) Professor Cleary suggested amending the title/to "Testimony by Accused upon Preliminary Matters." Judge Weinstein indicated "upon Preliminary Matters" is not needed because [illegible] the title rule indicated all the subdivisions are concerned with preliminary matters. [illegible] Professor Cleary amended his [illegible] motion and it carried.

Professor Cleary stated that Dean Joiner pointed out the use of"inadmissibile"in the various rules. Mr. Jenner stated "not admissible" could be substituted as long as there is no objection by the committee because it is a matter of style.

(e) Weight and Credibility. Professor Cleary stated the Chicago Bar Assn Cmte. suggested deletion of "before the jury" however this would change the meaning and purpose of the entire subdivision. Mr. Jenner stated the consensus of the committee is not to approve this suggestion and leave subdivision (d) as written.

Rule 105. Summing up and Comment by Judge

Mr. Raichle felt this rule is inappropriate because it deals with something after the close of the evidence. However he would agree to adding the Antitrust Section suggestion. He made a motion to add "fairly and impartially" on line 2. Judge VanPelt was disturbed about using those words as a grounds of assignment because this would create more chance of error and would raise problems that would be better to eliminate. Dean Joiner stated he felt the judge has a right to attempt to direct the jury in a case where the defendant may have been "railroaded" by the prosecution because of evidence against him. Judge Maris felt this rule is courtroom procedure.and not necessary an evidence problem. Professor Cleary stated it is a procedural matter which has to do with the use of evidence and Judge Maris agreed. The motion to add "fairly and impartially" was carried. Mr. Raichle made a motion to eliminate Rule 105. Mr. Selvin stated that comments by the judge in an antitrust case tried by a jury would be very helpful, and should be encouraged to do so. The motion was lost.

Rule 106. Limited Admissibility

Professor Cleary indicated that the New York Cmte. suggested making reference to Rule 403 (a). Mr. Jenner stated this is unnecessary. Professor Cleary stated Rule 403(a) is an over-riding rule and reference is made to this rule in the Notes. Therefore, the Committee/approved the rule as submitted.

Rule 107. Remainder of or Related Writings or Recorded Statements

Professor Cleary stated the ABA committees suggested adding relevancy, in addition to fairness, as a test to this ruleand indicated this had been considered previously. The American College Committee suggested substituting relevancy for fairness as the test. The basis for this came in connection with the provision in the original discovery rule which says when part of a depositions was admitted the oppsite party at that time could compel the party introduing it to introduce other parts which were relevant to the part introduced. The rules which

have been promulgated by the court adopt fairness as the test.

Judge Weinstein stated if you use relevancy the rule is not needed because it is covered under the relevancy rule. If was the consensus of the committee that the suggestion to substitute "relevancy" for"fairness" is not approved.

Professor Cleary stated the ABA Committees suggested adding "by the court" after "required" in line 3. As originally submitted to the Committee the rule followed the pattern of the criminal procedure rule, and the civil procedure rule puts this within the control of opposing counsel. The Committee took the opposite position and the language allowing the opposing counsel to insist on this was deleted, in order for the judge to have control. However specific language stating this was not incorporated into the rule. To clarify this the ABA Committees' suggestion was considered on the basis of policy. Mr. Henner stated the term judge should be used rather than court. The Committee discussed the question of whether the rule is ambiguous insofar as who requires. Professor Cleary recommended using the language of the Civil Rules it is clear that the judge has to consider the fairness question. If you simply say"in his discretion he may" then the judge may say no and never reaches the fairness question. Mr. Spangenberg suggested the term "may," should be "shall." Mr. Jenner agreed with Judge Weinstein that the Civil Rules is sound when it comes to depositions, however, in other evidence the judge should have some discretion. Mr. Spangenberg made a motion to change "may" to "shall" and at the suggestion of Professor Cleary changed the motion to adding "an adverse party may require him." to conform this rule to the language of the Civil Rule. The motion carried.and the phrase replaced "he may be required."

Professor Cleary stated the Dept. of Justice Committee 4 suggested after "statement" in line 5, inserting, "which is otherwise admissible or for which a proper foundation is laid." He felt this involves an elaboration of detail with respect to something which the rule implies. However it was decided to add a phrase meaning "any other admissible writing or recorded statement." Mr. Spangenberg stated the evidence might not be otherwise admissible. Judge Maris and Professor Cleary felt this problem is covered by the fairness rule. The motion was lost.

The Committee agreed with the Reporter's comments with respect to the suggestions of Professor Dow and the D. C. Conference Committee and Rule 107 was approved with the above-stated amendment.

Article II Judicial Notice

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of Rule. Professor Cleary summarized the basic difference between the preliminary draft and what Professor Davis advocates. Professor Davis would like to codify the entire Judicial Notice article,and to introduce as a result some concepts which are quite technical. Dean Ladd stated Professor Davis' concept is contrary to the position in both the Model Code and the Uniform Rules.

Professor Green stated he agreed with Professor Davis that judicial notice can be challenged even after it has been taken. Professor Cleary stated the rule should be improved in this area. Professor Green also agreed with Professor Davis that an objective of judicial notice should be convenience subject to the opportunity of the opponent to oppose.

Mr. Spangenberg preferred the Committee's view that you take judicial notice only on facts that are not reasonably subject to dispute.

Professor Wright agreed with Professor Cleary that they cannot usefully write a rule about judicial notice of legislative facts. However Professor Davis is correct that if this rule is limited to adjudicative facts the rule should say so rather than simply state this in the title. Professor Wright also agreed with Professor Davis in his criticism of subdivision (b). Dean Ladd made a motion to add "only" in line 2 as suggested by Professor Davis. The reason was to add emphasis to the meaning. Professor Cleary stated that in asmuch as Professor Davis felt subdivision (a) as written implies the inclusion of legislative facts and this should not be included, the rule should be rephrased. Therefore Professor Cleary suggested adding after "issue on line 2, "the particular facts in issue relating to the parties in the case. Professor Green suggested adding in the same place, "to which the law is applied when a case is adjudicated." Mr. Jenner stated it was the consensus of the committee to amend (a) as follows: This rule governs judicial notice only of particular facts in issue to which the law is applied when a case is adjudicated or facts from which they may be inferred." Mr. Raichle pointed out that if this were any other area in order to limit the scope the committee of the rule would merely say this rule is limited to adjudicative facts and does not extend to legislative facts. Dean Ladd stated this is perfectly clear. Professor Cleary stated the only trouble with this is outside of a few cases that quote Professor Davis one would need to look up the meaning of adjudicative in this sense. The Chairman then appointed a committee consisting of Professor Green, Professor Wright, Prof. Moore, Dean Ladd, Dean Joiner, and Professor Cleary to report on the languange of subdivision (a).

Professor Green reported that the subcommittee recommends striking subdivision (a) of Rule 2-01 and substitute, ~~xxhxx~~ "(a)This rule governs only judicial notice of adjudicative facts. The committee approved the recommendation.

(b) Kinds of Facts. Professor Cleary stated the suggestion of the ABA to redraft (b) in order to make it clear that "so that the fact is not subject to reasonable dispute"modifies both items (1) and (2). He felt, however, that the entire phrase could be stricken so that the fact is not subject to reasonable dispute. He stated the phrase merely reinforces what is already there. Dean Joiner moved to strike line 9 beginning with ",so" through line 10. Mr. Jenner stated that if something is generally known that does not mean it is not subject to reasonable dispute. Professor Moore felt the phrase should be put at the beginning so it would qualify both (1) and (2). Mr. Berger made a motion to add after"must be"on line 5, one not subject to reasonable dispute because." Mr. Jenner stated "because" contradicts (1). Mr. Berger then amended his motion to use "and" rather than "because." Dean Ladd stated this is wrong because it has to be of generalized knowledge. Professor Cleary stated things should be judicially notices only if they are beyond dispute. Mr. Berger amended his motion by adding "in that" rather than "and" on line 5. Professor Cleary agreed to the suggestion. The motion carried.

(c) When Discretionary. Approved as submitted.

(d) When Mandatory. Approved as submitted.

(e) Opportunity to be Heard. Professor Cleary stated that he agreed with Professor Davis suggestion this be revised as well as the text of the Note so as to provide for a hearing with respect to facts that have already been noticed, as well as those of which notice is in contemplation. He suggested deleting"to be" from lines 20 and 21 and adding, "In the absence of prior notification, the request may be made after judicial notice has been taken. The motion carried.

(f) Time of Taking Notice. Mr. Epton stated there seems to be some conflict between (f) and (g) when it comes to criminal cases. This problem was taken care of when the committee voted to strike the second sentence of subdivision (g) regarding criminal cases.

(g) Instructing Jury. Mr. Epton stated there seems to be some conflict between (f) and (g) when it comes to criminal cases. Professor Wright felt the second sentence should be stricken because it is contrary to existing law. Professor Cleary stated that comments from Judge Gard and from the Los Angeles County Bar Association indicate Judicial notice should be conclusive upon the jury in criminal as well as civil cases. However, Judge Weinstin expressed his strong opposition to the striking of the second sentence. He felt if it is stricken they would be writing something which is inconsistent with the Presumption rules. He did not think the power of the jury should be restricted. Dean Joiner made a motion to strike the last sentence and the first four words of the first sentence. The motion carried 6 to 4. Mr. Berger asked if everyone voted and Mr. Jenner stated that Mr. Spangenberg and Judge Van Pelt had to go back to their offices, and Judge Sobeloff was ill. Mr. Raichle made a motion to substitute the word "established" for "conclusive" which he felt was too strong a term. The motion carried.

Article III. Presumptions

Rule 301. Presumptions in ~~Other Cases~~ General. (appears as Rule 303 in the Preliminary Draft)

Professor Cleary stated they had received criticism from Judge Lay and the D.C. Conference Committee 6 regarding the use of the term presumption in instructing the jury in criminal cases. He indicated the difficulty is that there has not been anything drafted in the rule which says presumption should be talked about to the jury. Judge Estes stated his committee felt a jury would consider a stronger conviction by using the place of term presumption. Professor Cleary stated they needed the term presumption.

Mr. Raichle did not like the article to start with the title, "Presumptions Against Accused in Criminal Cases." He felt, "Against the Accused" should be stricken. Professor Cleary stated this would change the organization of the three rules under the Article III on Presumptions. He stated the first one deals with a particular situation of a presumption which is directed against the accused, the second deals with diversity situations, and the third deals with all situations. Mr. Berger made a motion to reverse Articles 301 and 303 and change the numbers accordingly. The motion carried. ~~Mr. Haywood questioned the title Presumptions in Other Cases since it is now the first rule. Professor Cleary suggested changing the title to "Presumptions in General."~~

Rule 301. Presumptions in General, cont'd

Mr. Haywood questioned the title"Presumptions in Other Cases" since it is now the first rule. Professor Cleary suggested changing the title to "Presumptions in General" and the members agreed.

Professor Cleary pointed out the suggestions which were of particular merit. The South Carolina, ABA, and Chicago Bar Committees all suggested striking subdivision (c) and the American College Committee submitted an alternative. Dean Joiner made a motion to subdivision (c), lines 9 through 77. The motion carried. Judge Maris suggested combining subdivision (a) and (b). The motion to combine these subdivisions thus having no subtitles was carried.

Rule 302. Applicability of State Law.in Civil Cases

Professor Cleary called the Committee's attention to a suggestion from the California State Bar to substitute, "law of that state" in line 5 for "state law." Professor Wright stated there is no antecedent for the word "that." Judge Estes stated that because it says "which is an element of a claim or defense" it is Supreme Court law and the rule should not be changed. Professor Moore thought that some presumptions are not governed by state law. Inasmuch as there was no motion for the suggestion, the rule remained as drafted.

Mr. Raichle moved the suggestion of the American College to add "in Civil Cases" to the title, and the motion carried.

Rule 303, Presumptions Against Accused in Criminal Cases.

(b) Submission to the Jury. Professor Cleary called the Committee's attention to the suggestion of the American College Committee to delete the final sentence on lines 18-23. However he felt the sentence should be revised because the phrase "other presumptions" is vague and raises a problem as to the identity of the presumptions that are referred to. He suggested striking in line 18 "Under other presumtpions," and substituting "When the presumed fact has a lesser scope." Mr. Berger motioned to substitute, "When the presumed fact has a lesser effect." The motion carried. Professor Wright suggested a statement in the Note that this rule does not apply to determination of sanity or insanity in a criminal case. The Reporter agreed.

(c) No discussion

Articles IV. Relevancy and Its Limits.

Rule 401. Definition of "Relevant Evidence." Professor Cleary indicated that Professor Green pointed out that the second paragraph of the Note is misleading in stating that the rules in this Article do not deal with conditional relevancy. The Reporter stated he would rephrase the paragraph.

Professor Cleary point out the suggestion of the ABA Committees and the International Association of Insurance Counsel to substitute "any material fact" for "any fact that is of consequence to the determination of the action." There was no motion to that effect and the rule remained as drafted.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. The Department of Justice Committee and Professor Green pointed out that the rule fail to make reference to other federal rules of procedure. Professor Cleary agreed with these comments and suggested adding, "by these or other rules adopted pursuant to authorization by Congress." To encompass these rules as well as other rules, Judge Weinstein suggested adding "rules adopted by the Supreme Court." Mr. Erdahl moved to add after rules in line 2 following the comma "by other rules adopted by the Supreme Court,". The motion carried.

Professor Cleary stated the suggestion of the South Carolina Chapter of the American College to add an addition to the exceptions in the first sentence. However he felt it was tied in so closely with Article V that the suggestion should be discussed later.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Professor Cleary stated there were a number of comments indicating the division of the coverage into the two types of situations is artifical, and unrealistic, and should be combined into one situation. After reviewing these comments he felt the division is a valid one and by separating them it requires the judge under (a) to go through the evidence.in the case.

The ABA Committee suggested substituting "undue" for "unfair" in line 4 however the Reporter recommended against it. There was no motion to effect the suggestion therefore the Rule was approved as drafted.

The committee discussed the suggestion of the International Association of Insurance Counsel to add "unfair surprise" as a ground in (a). The Reporter felt this would create a new ground of exclusion, however, he felt the trial lawyer members should give this problem particular attention. In Mr. Berger's opinion the problem was taken care of by pretrial orders. Mr. Jenner pointed out that all courts don't have a pretrial. Professor Wright stated the judge should have discretionary power to exclude evidence if an unfair advantage results, and this power should be included in subdivision (b). Mr. Williams stated he knew of no situation where the judge should exclude evidence unless there has been some wrongdoing on the part of the other person. Mr. Haywood suggested using the language of the Wall Street lawyers, "or the risk that its admission would unfairly and harmfully surprise the party who has not had reasonable opportunity to anticipate that the evidence would be offered." Professor Wright suggested adding, "unfair surprise as to wrongful concealment of the existence of the evidence." Mr. Williams felt this language covers the situation however it does not add anything. Judge Weinstein felt evidence should not be excluded on the basis of unfair advantage but a new trial should be granted. Based on Mr. Raichle's suggestion, Mr. Epton made a motion of policy to include language which allows exclusion of evidence to prevent unfair surprise to wrongful concealment of the existence of evidence. The motion lost 6 to 5.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally.

Professor Cleary called attention to the suggestion submitted by the ABA California State Bar, Department of Justice and American College Committees to add a cross reference to other related Rules such as Rules 607, 608, and 609. He suggested adding in line 17, "as provided in Rules 608 and 609. If a reference is made to Rule 607, however, "offered to attack or support his credibility" on lines 16-17 should be stricken.

Dean Joiner made a motion to strike the above suggested words and substitute, "as provided in Rules 607, 608, and 609." The motion carried.

Professor Cleary stated there had been a suggestion to substitute for "his character or a" in (1) and (2) of subdivision (a) the words, "a pertinent." The motion carried. Mr. Raichle questioned the use of the phrase "and similar evidence offered" in (1) and (2). Professor Cleary suggested substituting "or." The motion to change (1) to read, "Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;" was carried. The motion to make the same change in (2) was also carried.

Dean Joiner felt the suggestion of the Department of Justice that a judge in a civil case for assault should have discretion to allow evidence of the pugnacious character of the plaintiff-victim to support a claim of self-defense, has merit. *Mr. Raichle moved that there be no change with respect to this suggestion and the Committee agreed.

*Professor Cleary indicated this question has previously been discussed by the Committee.

(b) Other Crimes. Professor Cleary indicated the general feeling of the comments was that the subdivision needed to be tightened up.because the prosecutor is inclined to get out of bounds in this area. This could be accomplished by indicating some reference to the need for the evidence. The members discussed the suggestion of the D. C. Conference Committee to change the language to limit the exception basically to modus operandi situations, or the Note should indicate that no retreat from Drew V. United States is intended. The Reporter expressed his opposition to this stating that Drew has nothing to do with the situation.

Professor Green felt the court frequently overlooks the requirement of relevancy in this connection. Mr. Jenner suggested amending the last sentence to include a phrase,"if relevant." Professor Cleary stated that if the phrase is added a direct reference to 403(a) would also have to be added and then this would have to be done in other rules.to be consistent.

*Mr. Spangenberg made a motion to strike the Note to line 26 after accident. Prof.Green suggester this be made reference to in Professor Green made a motion of policy to add "when relevant" the Note to line 26 after accident. Mr. Berger stated he was opposed because you would have to add when relevant in other places. The motion was lost. * Mr. Erdahl made a motion to leave the Note as is and the motion carried.

*Mr. Jenner suggested Professor Cleary take another look at the Note however,

Professor Cleary stated that several members of the California State Bar Committee suggested that the second sentence should provide for reasonable notice to be given by the prosecution if evidence of other wrong doing is to be offered for the specified purpose. Mr. Erdahl stated the new discovery rules and the amendments to the Criminal Rules provide for a listing of the witnesses to be called and it would be appropriate to include this in the Evidence Rules. Mr. Williams felt this would not solve the problem because the Criminal Rules do not state that you can discover that evidence of other crimes is going to be put in against the defendant. There was no motion to add this suggestion to (b).

Rule 405. Methods of Proving Character.

(a) Reputation or Opinion. Mr. Raichle felt the wording of the subdivision would lead people to believe that opinion means opinion as to reputation rather than as to trait of character. Dean Join made a motion to include"by testimony" after "or" in line 4. The motion carried.

(b) now

Professor Cleary stated that as Rule 608/stands it precludes the use of reputation for truth as a means of impeaching or supporting the creditability of a witness. He therefore stated this is inconsistent with 405(a). A suggestion had been made that if Rule 608 (b) is to be retained the Committee should incorporate a provision subject to Rule 608(b).

Professor Cleary stated that a question was raised by the Department of Justice Committee and Professor Dow as to the type of cross examination that a character witness may be subjected to, that is whether inquiry may be made into specific instances for the purpose of demonstarting his character was not as the witness testified. Dean Ladd stated that you should beable to impeach the character witness by showing that he was unaware of the true reputation of the man or that his judgment was bad in calling reputation good of a man who had done many other bad acts or that he was falsifying. Professor Cleary suggested adding, "On cross-esamination, inquiry is allowable into specific instances of conduct relevant to the trait in question." He stated a similar phrase should also be added to subdivision (b). Mr. Haywood Made a motion to add the language on 1.5 suggested by Professor Cleary. Mr. Williams felt this language changed the meaning of the rule substantially. For the defendant's benefit he felt the Rule should remain as stated. Mr. Spangenberg pointed out that when character is used as to support an inference logically the court should know whether that really is his character by proof of reputation but once character is introduced by any kind of testimoney, reputation, or opinion, cross examination should not be limited to that specific mode but rather to the specfic question, does he have the character. He amended the motion to add at the end "into opinion, and into reputation." The motion to amend carried. The motion to add a sentence at the end of line 5 as stated above was carried.

Professor Moore indicated that "character or" should be stricken from lines 2 and 7 of Subdivision (a) and (b) in order to be consistent with the language in Rule 404. The Committee agreed.

Rule 406. Habit: Reoutine Practice.

Mr. Epton felt the meaning of the word "opinion" is uncertain therefore Mr. Selvin suggested making a reference in the Note to Rule 701 which defines this type of opinion. Mr. Epton motioned to strike "in the form of an opinion or by" because as worded they have placed it in opposition to the second clause. Also this would eliminate general statements. Mr. Williams stated this would be taken care of by cross-examination. Mr. Epton made a motion to substitute "for" in line 9 in place of the phrase. The motion lost. However the Committee agreed that the Note should be revised.

Rule 407. Subsequent Remedial Measures.

Mr. Berger felt "measures" is an artifical term and should be replaced by "actions" or "conduct." Professor Cleary stated that ceasing to do something is not an action, and if you use the word "conduct" it does not sound correct. Mr. Berger's motion to substitute "conduct" for"measures" was lost.

Professor Cleary suggested striking "remedial" from line 7 because it is redundant. Dean Joiner made a motion to that effect. Mr. Jenner questioned the motion because the word is a part of the title. Dean Joiner explained that it is a"catch"title which alerts the bar as to the subject of the rule. The motion was carried

Professor Cleary stated that a number of suggestions received took the position that if the second sentence is unchanged the exception in the second sentence eliminated as an effective force the provisions in the first sentence. Both the American College Committee and the Assn of Insurance Counsel suggested limiting the evidence under the exceptions to cases where there was a denial of the other purpose. The difference in the language they suggested was only in procedure. The Department of Justice Committee, the N. Y. County Bar, the Florida State Bar and a couple individual comments suggested striking the entire last sentence or at least the mention of feasibility. The Committee began discussing cases in which feasibility was an issue.* Mr. Spangenberg felt these cases in which feasibility had to be proved was rare. In most instances it is obvious that the precaution was a feasible one, the jury would realize this and the defendant would not deney it. Under 402 (a) on drugs such as thalidimide.cases. When feasible is an issue why wait for rebuttal, he stated. He had no objections to adding Professory Cleary's phrase. Professor Cleary changed his phrase to "if denied." Mr. Haywood felt this is too strike and suggested adding "if controverted." Professor Cleary agreed. The motion carried.

*Professor Cleary suggested adding after precautionary measures, "unless admitted."

Rule 408. Compromise and Offers to Compromise

Professor Cleary pointed to the International Assn of Insurance Counsel's suggestion to insert in line 11, after "purpose", the words "separate and distinct from any issue related to liability or invalidity." He felt the phrase was repetitious. There was no motion for change.

The Counsel also suggested adding at the end of the rule the further sentence, "The submitting to the jury of any evidence admitted for such other purpose shall be accompanied reasonably contemporaneously by instructions to the jury, without respect of counsel, describing the limitation of purpose and consideration of the evidence." The Committee agreed with Professor Cleary's comment that the sentence would belong in Rule 106, however, there is no reason to single out compromise situations for special mention with respect to limiting instructions. Professor Cleary stated that Judge Gard suggested admissions of fact made in compromise negotiations should be admissible. He stated the Committee has expanded the area of exclusion.

Rule 409. Payment of Medical and Similar Expenses.

Professor Cleary pointed out the suggestion by the Insurance Counsel committee to add the sentence, "This rule does not require exclusion when the evidence is offered for the purpose of proving mitigation of damages." and commented that this addtion of such an exception would be consistence with the pattern of other rules in this area. Mr. Jenner felt the rule is simple and the exception does not need to be cited. Mr. Epton objected and Mr. Haywood withdrew his motion.

Rule 410. Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty.